

No. 13100

United States
Court of Appeals
for the Ninth Circuit.

ADDISON N. HIMES and ROSS A. HIMES,
Appellants,
vs.

V. B. CHADWICK, an Individual, Doing Business
Under the Firm Name and Style of COAST
CARTON COMPANY,
Appellee.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 358)

Appeal from the United States District Court for the
Western District of Washington,
Northern Division.

FILED

JAN 26 1952

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

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5th Floor, 391 Sutter Street,
San Francisco 8, California,

Attorneys for Appellants.

FORD E. SMITH,
734 Central Building,
Seattle 4, Washington;

C. M. McCUNE,
4516 University Way,
Seattle 5, Washington,

Attorneys for Appellee.

II.

That plaintiffs are informed and believe and on information and belief allege that the defendant V. B. Chadwick is a resident of Seattle, County of King, State of Washington, and has a regular and established place of business at Seattle, Washington, within the jurisdiction of this Court.

III.

That this Court has jurisdiction of this cause because the same arises under the patent laws of the United States.

IV.

That prior to May 22, 1933, Robert D. Parks and Glenn Hildenbrand were the inventors of Folding Carton, and being entitled under the law to a patent upon their said invention, did, on the 22nd day of May, 1933, make application for Letters Patent therefor, and pursuant to said application, Letters Patent of the United States No. 2,011,232 were duly, lawfully and regularly issued upon said application of the said Robert D. Parks and Glenn Hildenbrand.

V.

That plaintiffs herein, prior to the filing of this amended complaint, became the owners by assignments of all of the entire right, title and interest in and to and under said Letters Patent No. 2,011,232 with the right to sue for past infringement thereof.

VI.

That prior to February 24, 1939, Ross A. Himes was the inventor of Paper Box and Method of Making the Same, and, being entitled under the law to a patent upon his said invention, did on the 24th day of February, 1939, make application for Letters Patent therefor, and pursuant to said application Letters Patent of the United States No. 2,243,421 were duly, lawfully and regularly issued upon said application of the said Ross A. Himes.

VII.

That plaintiff herein, prior to the filing of this amended complaint, became the owners by assignment of all of the entire right, title and interest in, to and under said Letters Patent No. 2,243,421 with the right to sue for past infringement thereof.

VIII.

That plaintiffs are informed and believe and on information and belief allege that the defendant V. B. Chadwick has, within six years last past and prior to the filing of this complaint, and within the Western District of Washington, Northern Division, infringed said Letters Patents Nos. 2,011,232 and 2,243,421.

IX.

Plaintiffs are informed and believe and on information and belief allege that defendant has committed the aforesaid acts of infringement in know-

ing, wanton and deliberate disregard of the rights of plaintiffs in the premises.

X.

That plaintiffs have been damaged by the infringing acts of defendant in an amount unknown to plaintiffs, but plaintiffs are informed and believe and on information and belief allege that said damage is in excess of Twenty-five Thousand Dollars (\$25,000.00).

Wherefore Plaintiffs Pray:

1. For damages from the defendant for the infringement of said Letters Patents Nos. 2,011,232 and 2,243,421 in the amount of three per cent (3%) of the net sales price of cartons manufactured by the defendants.

2. That plaintiffs have judgment against the defendant for reasonable attorneys' fees incurred by plaintiffs in this action.

3. That plaintiffs have judgment against the defendant for their costs and disbursements herein.

ADDISON N. HIMES,
ROSS A. HIMES.

By /s/ JACK C. HURSH,
One of Counsel for
Plaintiffs.

ARNOLD and MATHIS,
/s/ CLINTON L. MATHIS.

[Endorsed]: Filed February 9, 1949.

[Title of District Court and Cause.]

DEMAND FOR JURY TRIAL

To V. B. Chadwick and Coast Carton Company, and
to McCune & Yothers, their attorneys:

You and each of you are hereby notified that
trial by jury in the above entitled cause is demanded
by the above-named plaintiffs.

MELLIN & HANSCOM,
ARNOLD & MATHIS,
By /s/ JACK C. HURSH,
/s/ CLINTON L. MATHIS.

[Endorsed]: Filed February 9, 1949.

[Title of District Court and Cause.]

MORE DEFINITE STATEMENT

Come now plaintiffs in the above-entitled action
and answer defendant's motion for more definite
statement as follows:

(a) As presently advised, plaintiffs will rely
upon all of the claims of Patent Number
2,011,232 as having been infringed by defendant.

(b) As presently advised, plaintiffs will rely
upon all of the claims of Patent Number
2,243,421 as having been infringed by defend-
ant.

(c) The particular carton manufactured and

sold by defendant which plaintiffs deem an infringement of the claims relied upon as having been infringed by defendant are the cartons having a bottom construction similar to that in a carton manufactured and sold by defendant to Nalley's, Inc., of Spokane and Tacoma, Washington, for potato chips.

The carton in possession of plaintiffs which is an infringement of the claims of said above-identified patents is one having the following legends on the front and back panels:

Nalley's
Fresh Potato Chips
Potatoes, Edible Vegetable Oil and Salt
Two Pounds Net Weight
Distributed by Nalley's, Inc., Spokane,
Tacoma, Washington

If It's
Nalley's
It's Good

and having the following legend on the side panels:

From
Nalley
Valley
Where Good Flavors Grow

and having the following legend on the top panel:

Also use:

Lumberjack Syrup,
Nalley's Mayonnaise,
Nalley's Dill Pickles,

Nalley's Hamburger Relish,
Nalley's Mustard,
Nalley's Sweet Relish,
Tang.

Said carton is of a size of 9 $\frac{1}{4}$ "x 11"x 6 $\frac{1}{4}$ ".

ADDISON N. HIMES,
ROSS A. HIMES.
MELLIN & HANSCOM,
ARNOLD & MATHIS,
By /s/ CLINTON L. MATHIS,
Attorneys for Plaintiffs.

Copy received.

[Endorsed]: Filed July 29, 1949.

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM

Answer

Comes Now the defendant and answers the Amended Complaint as follows:

One

Answering Paragraphs I, II, and III of the Amended Complaint, defendant admits the allegations contained therein.

Two

Answering Paragraphs IV and VI of the Amended Complaint, defendant admits that said applications for Letters Patent were made on said

dates and that pursuant to said applications, Letters Patent were issued to said parties, but denies the remaining allegations of said paragraphs.

Three

Answering Paragraphs V and VII of the Amended Complaint defendant alleges that he is without knowledge or information sufficient to form a belief as to the facts alleged therein, and therefore denies all of the allegations of said paragraphs.

Four

Answering Paragraphs VIII, IX, and X of the Amended Complaint, defendant denies each and every allegation contained therein.

Five

The defendant further answering the Amended Complaint, pleads the following special defenses:

A. Upon information and belief, that the device charged to infringe either or both of the patents in suit is constructed of old elements combined in old aggregations, and is not subject to exclusive appropriation and may be manufactured and sold by anyone.

B. That each of the said United States Letters Patent in suit is invalid for want of invention.

C. That each of the said United States Letters Patent is invalid because each and all of the claims thereof include mere aggregations of old elements.

D. That said United States Letters Patent No. 2,011,232 are invalid because the alleged invention

disclosed and claimed therein was known and/or used by others before the alleged invention thereof, and/or was patented or described in a printed publication in this or in foreign countries before the alleged invention thereof and/or more than two years prior to the application therefor and/or was in public use and/or sale in this country more than two years prior to the application therefor, and particulars of said prior knowledge, use, patenting, publication, public use, and/or sale being as follows:

United States Letters Patent to:

		Dated
Arthur	No. 205,603	7/ 2/1878
Colburn	No. 283,209	8/14/1883
Tatum	No. 291,805	1/ 8/1884
Lindemeyer	No. 466,792	1/12/1892
Knobeloch	No. 616,473	12/27/1898
Wagnitz	No. 683,532	10/ 1/1901
Seegmiller	No. 772,381	10/18/1904
Medley	No. 797,446	8/15/1905
Rutledge	No. 805,234	11/21/1905
Brown	No. 875,409	12/21/1907
Morris	No. 1,362,129	12/14/1920
Laubersheimer	No. 1,509,735	9/23/1924
Berkowitz	No. 1,523,246	1/13/1925
Morris	No. 1,654,140	12/27/1927
Cramer	No. 1,662,698	3/13/1928
Creasey	No. 1,679,710	8/ 7/1928
Berkowitz	No. 1,700,733	2/ 5/1929
Filmer	No. 1,885,045	4/19/1932
Neumann	No. 2,017,724	10/15/1935

British Patents to:

		Accepted
Thornton	No. 24,581	10/24/1896
Filmer	No. 345,682	4/ 2/1931

French Patent to:

		Published
Leblanc	No. 425,017	5/31/1911
and others whose names, numbers and dates, defendant prays leave to hereafter add by amendment, or otherwise, when the same shall have been fully determined or ascertained.		

E. That said United States Letters Patent No. 2,243,421 are invalid because the alleged invention disclosed and claimed therein was known and/or used by others before the alleged invention thereof, and/or was patented or described in a printed publication in this or in foreign countries before the alleged invention thereof and/or more than two years prior to the application therefor and/or was in public use and/or on sale in this country more than two years prior to the application therefor, and particulars of such prior knowledge, use, patenting, publication, public use, and/or sale being as follows:

United States Letters Patent to:

		Dated
Knobeloch	No. 616,473	12/27/1898
Wagnitz	No. 683,532	10/ 1/1901
Seegmiller	No. 772,381	10/18/1904
Rutledge	No. 805,234	11/21/1905
Laubersheimer	No. 1,509,735	9/23/1924

Berkowitz	No. 1,523,246	1/13/1925
Cramer	No. 1,662,698	3/13/1928
Parks	No. 2,011,232	8/13/1935
Neumann	No. 2,017,724	10/15/1935
Weiss	No. 2,066,753	1/ 5/1937

British Patent to:

		Accepted
Filmer	No. 345,682	4/ 2/1931

French Patent to:

		Published
Leblanc	No. 425,017	5/31/1911

and others whose names, numbers and dates, defendant prays leave to hereafter add by amendment, or otherwise, when the same shall have been fully determined or ascertained.

F. That each of the aforesaid Letters Patent were issued by the United States Patent Office without due investigation and that an important part of the relevant prior art hereinbefore set forth was overlooked and other parts of said prior art were improperly applied and construed; wherefore the Commissioner of Patents exceeded his legal authority in granting the aforesaid Letters Patent and each of the said patents is, therefore, void and of no effect.

G. That the alleged inventions claimed in the aforesaid patents are different in substantial degree from any indicated, suggested, or described in the original applications therefor.

H. That the alleged inventions and each claim

thereof are not the joint inventions of the parties claiming joint inventorship in said inventions, but the alleged inventions and claims or parts thereof are the sole inventions of one of aforesaid parties.

I. That plaintiffs have failed to give defendant proper notice of alleged infringement and have failed to mark the boxes made, used or sold by the plaintiffs or their licensees under said Letters Patent as required by the provisions of 35 U.S.C. Sec. 49; R.S. 4900.

J. That said Letters Patent and each of them are invalid because the description, specification and claims thereof are ambiguous, indefinite and uncertain and fail to comply with the provisions of 35 U.S.C. Sec. 33; R.S. 4888.

K. That plaintiffs are estopped to assert any cause of action against the defendant or to maintain this suit by reason of the fact that they come into this Court with unclean hands.

L. That the defendant has at no time or place made use of the alleged inventions claimed in each of the Letters Patent in suit, that it has never practiced any process or made, used or sold any containers in infringement of any rights of the plaintiffs thereunder, or damaged the plaintiffs in respect of any of said Letters Patent or profited by reason of anything contained in or covered by each of said Letters Patent.

Six

The defendant further answering the Amended Complaint, pleads the additional special defense that:

A. Defendant, since long prior to the institution of this action, has been and is the exclusive licensee in the States of Idaho, Oregon, Washington, Utah and the territories of Alaska, Hawaii and the Philippine Islands, to make and sell cartons under United States Letters Patent No. 2,388,190 issued October 30, 1945, to R. F. Smart for a "Foldable Cardboard Box."

B. Defendant manufactured and sold the carton identified by the plaintiffs in Paragraph (C) of its More Definite Statement in this action under his license to make and sell cartons under said United States Letters Patent No. 2,388,190, and such carton when sold bore the statutory patent notice as required by 35 U.S.C. sec. 49; R.S. 4900.

Counterclaim

The defendant complains of the plaintiffs, and, as his claim for relief, alleges that:

Seven

Defendant-counterclaimant is a citizen of the United States and a resident of Seattle, County of King, State of Washington, and is doing business under the firm name and style of Coast Carton Company.

Eight

Plaintiffs-counterdefendants Addison N. Himes and Ross A. Himes are citizens of the United States and residents of Walnut Creek, County of Contra Costa, State of California, and Arcadia, County of Los Angeles, State of California, respectively, and

are doing business under the firm name and style of Nolo Company of America.

Nine

This Court has jurisdiction of the Counterclaim because the same arises under the patent laws of the United States because it is an action for declaratory judgment arising under Title 28 United States Code, Judiciary and Judicial Procedure Sec. 2201 (as amended by Act of May 24, 1949) and arises from an actual controversy between the parties.

Ten

Plaintiffs-counterdefendants by virtue of having filed the Complaint herein have charged the defendant-counterclaimant with acts constituting infringement of United States Letters Patent Nos. 2,011,232 and 2,243,421.

Eleven

The defendant-counterclaimant further alleges:

A. Upon information and belief, that the device charged to infringe either or both of the patents in suit is constructed of old elements combined in old aggregations, and is not subject to exclusive appropriation and may be manufactured and sold by anyone.

B. That each of the said United States Letters Patent in suit is invalid for want of invention.

C. That each of the said United States Letters Patent is invalid because each and all of the claims thereof include mere aggregations of old elements.

D. That said United States Letters Patent No.

2,011,232 are invalid because the alleged invention disclosed and claimed therein was known and/or used by others before the alleged invention thereof, and/or was patented or described in a printed publication in this or in foreign countries before the alleged invention thereof and/or more than two years prior to the application therefor and/or was in public use and/or sale in this country more than two years prior to the application therefor, and particulars of said prior knowledge, use, patenting, publication, public use, and/or sale being as follows:

United States Letters Patent to:

		Dated
Arthur	No. 205,603	7/ 2/1878
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Knobeloch	No. 616,473	12/27/1898
Wagnitz	No. 683,532	10/ 1/1901
Seegmiller	No. 772,381	10/18/1904
Medley	No. 797,446	8/15/1905
Rutledge	No. 805,234	11/21/1905
Brown	No. 875,409	12/21/1907
Morris	No. 1,362,129	12/14/1920
Laubersheimer	No. 1,509,735	9/23/1924
Berkowitz	No. 1,523,246	1/13/1925
Morris	No. 1,654,140	12/27/1927
Cramer	No. 1,662,698	3/13/1928
Creasey	No. 1,679,710	8/ 7/1928
Berkowitz	No. 1,700,733	2/ 5/1929
Filmer	No. 1,885,045	4/19/1932
Neumann	No. 2,017,724	10/15/1935

British Patents to:

		Accepted
Thornton	No. 24,581	10/24/1896
Filmer	No. 345,682	4/ 2/1931

French Patent to:

		Published
Leblanc	No. 425,017	5/31/1911

and others whose names, numbers and dates, defendant-counterclaimant prays leave to hereafter add by amendment, or otherwise, when the same shall have been fully determined or ascertained.

E. That said United States Letters Patent No. 2,243,421 are invalid because the alleged invention disclosed and claimed therein was known and/or used by others before the alleged invention thereof, and/or was patented or described in a printed publication in this or in foreign countries before the alleged invention thereof and/or more than two years prior to the application therefor and/or was in public use and/or on sale in this country more than two years prior to the application therefor, and particulars of such prior knowledge, use, patenting, publication, public use, and/or sale being as follows:

United States Letters Patent to:

		Dated
Knobeloch	No. 616,473	12/27/1898
Wagnitz	No. 683,532	10/ 1/1901
Seegmiller	No. 772,381	10/18/1904
Rutledge	No. 805,234	11/21/1905

Laubersheimer	No. 1,509,735	9/23/1924
Berkowitz	No. 1,523,246	1/13/1925
Cramer	No. 1,662,698	3/13/1928
Parks	No. 2,011,232	8/13/1935
Neumann	No. 2,017,724	10/15/1935
Weiss	No. 2,066,753	1/ 5/1937

British Patent to:

		Accepted
Filmer	No. 345,682	4/ 2/1931

French Patent to:

		Published
Leblanc	No. 425,017	5/31/1911

and others whose names, numbers and dates, defendant-counterclaimant prays leave to hereafter add by amendment, or otherwise, when the same shall have been fully determined or ascertained.

F. That each of the aforesaid Letters Patent were issued by the United States Patent Office without due investigation and that an important part of the relevant prior art hereinbefore set forth was overlooked and other parts of said prior art were improperly applied and construed; wherefore the Commissioner of Patents exceeded his legal authority in granting the aforesaid Letters Patent and each of the said patents is, therefore, void and of no effect.

G. That the alleged inventions claimed in the aforesaid patents are different in substantial degree from any indicated, suggested, or described in the original applications therefor.

H. That the alleged inventions and each claim therefor are not the joint inventions of the parties claiming joint inventorship in said inventions, but the alleged inventions and claims or parts thereof are the sole inventions of one of aforesaid parties.

I. That plaintiff-counterdefendant have failed to give defendant-counterclaimant proper notice of alleged infringement and have failed to mark the boxes made, used or sold by the plaintiff-counterdefendants or their licensees under said Letters Patent as required by the provisions of 35 U.S.C., Sec. 49; R.S. 4900.

J. That said Letters Patent and each of them are invalid because the description, specification and claims thereof are ambiguous, indefinite and uncertain and fail to comply with the provisions of 35 U.S.C., Sec. 33; R.S. 4888.

K. That plaintiff-counterdefendants are estopped to assert any cause of action against the defendant-counterclaimant or to maintain this suit by reason of the fact that they come into this Court with unclean hands.

L. That the defendant-counterclaimant has at no time or place made use of the alleged inventions claimed in each of the Letters Patent in suit, that it has never practiced any process or made, used or sold any containers in infringement of any rights of the plaintiff-counterdefendants thereunder, or damaged the plaintiff-counterdefendants in respect of any of said Letters Patent or profited by reason

of anything contained in or covered by each of said Letters Patent.

Twelve

The defendant-counterclaimant further alleges that:

A. Defendant-counterclaimant, since long prior to the institution of this action, has been and is the exclusive licensee in the States of Idaho, Oregon, Washington, and Utah, and the territories of Alaska, Hawaii and the Philippine Islands to make and sell cartons under United States Letters Patent No. 2,388,190 issued October 30, 1945, to R. F. Smart for a "Foldable Cardboard Box."

B. Defendant-counterclaimant manufactured and sold the carton identified by the plaintiff-counterdefendants in Paragraph (C) of its More Definite Statement in this action under his license to make and sell cartons under said United States Letters Patent No. 2,388,190, and such carton when sold bore the statutory patent notice as required by 35 U.S.C, Sec. 49; R.S. 4900.

Wherefore, the Defendant-Counterclaimant Prays:

One

That the Complaint be dismissed.

Two

For a decree declaring that:

a. United States Letters Patent in suit Nos. 2,011,232 and 2,243,421 are invalid; and

b. Defendant-counterclaimant has committed no act or acts of infringement of any United

States Letters Patent owned by the plaintiff-counterdefendant.

Three

That an injunction issue out of and under the Seal of this Court directed to the plaintiffs-counterdefendants, their associates, partners, attorneys, clerks, servants, agents, employees and confederates and all in privity with them and each of them, perpetually enjoining them and each of them from instituting or proceeding with, in this or in any other Court, any suits or actions against this defendant-counterclaimant, or those holding under it, its successors or assigns and its customers for infringement of either of said United States Letters Patent Nos. 2,011,232 and 2,243,421.

Four

Defendant-counterclaimant be awarded reasonable attorneys fees in this action together with his costs.

/s/ FORD E. SMITH,

Attorney for Defendant-
Counterclaimant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 12, 1949.

[Title of District Court and Cause.]

ANSWER TO COUNTERCLAIM

Come now plaintiffs-counterdefendants, and for their answer to the counterclaim herein filed admit, deny and allege as follows:

1. Answering Paragraph Seven, plaintiffs-coun-

ter-defendants admit the allegations therein contained.

2. Answering Paragraph Eight, plaintiffs-counter-defendants admit the allegations therein contained.

3. Answering Paragraph Nine, plaintiffs-counter-defendants admit that there is an actual controversy between the parties; except for said admission, plaintiffs-counter-defendants deny each and every, all and singular, the other allegations in said paragraph contained.

4. Answering Paragraph Ten, plaintiffs-counter-defendants admit the allegations therein contained.

5. Answering Paragraph Eleven, plaintiffs-counter-defendants deny each and every, all and singular, the allegations therein contained.

6. Answering Paragraph Twelve (A), plaintiffs-counter-defendants deny the allegations therein contained.

Answering Paragraph Twelve (B), plaintiffs-counter-defendants admit that defendant-counter-claimant manufactured and sold the carton identified by the plaintiffs-counter-defendants in Paragraph (C) of its More Definite Statement; except for said admission, plaintiffs-counter-defendants deny each and every, all and singular, the allegations in said paragraph contained.

7. Further answering said counterclaim, plaintiffs-counter-defendants allege that defendant-coun-

terclaimant has within six (6) years last past and within the Western District of Washington, Northern Division, infringed said Letters Patent Nos. 2,011,232 and 2,243,421.

8. Further answering said counterclaim, plaintiffs-counter-defendants allege that on information and belief defendant-counterclaimant committed his acts of infringement in knowing, wanton and deliberate disregard of the rights of plaintiffs-counter-defendants.

Wherefore, plaintiffs-counter-defendants pray:

1. That defendant-counterclaimant take nothing by its counterclaim and that the same be dismissed.

2. That plaintiffs-counter-defendants have judgment against defendant-counterclaimant for reasonable attorneys' fees incurred by plaintiffs-counter-defendants.

3. That plaintiffs-counter-defendants have judgment against defendant-counterclaimant for their costs and disbursements and such other and further relief as this Court may deem meet and proper in the premises.

ADDISON N. HIMES,
ROSS A. HIMES,
ARNOLD & MATHIS,
By /s/ CLINTON L. MATHIS,
Attorneys for Plaintiffs-
Counter-Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 23, 1949.

[Title of District Court and Cause.]

LIMITATION OF ISSUES RAISED BY
AMENDED COMPLAINT, ANSWER TO
AMENDED COMPLAINT, COUNTER-
CLAIM, AND ANSWER TO COUNTER-
CLAIM

It is hereby stipulated by and between the parties hereto through their respective counsel of record as follows:

I.

That all claims of Parks patent No. 2,011,232 in suit, except claims numbered 2 and 5, are withdrawn from issue.

II.

(A) That the issues as to the Parks patent No. 2,011,232 are limited to the validity of claims 2 and 5 or either thereof.

(B) If either or both of said claims is found to be valid, the defendant shall be adjudged to have infringed such valid claim or claims by his acts of manufacturing and selling boxes complained of in the amended complaint and exemplified by the box attached as an exhibit to defendant's interrogatories on file herein and now marked Exhibit 3 to the Himes' deposition.

III.

That all claims of Himes patent 2,243,421 are withdrawn from issue, except claim number 1.

IV.

That the issues as to the Himes patent are limited to:

- (a) Is claim 1 of Himes patent valid or invalid?
- (b) If claim 1 of Himes patent is valid, is it infringed by acts of the defendant or not infringed thereby?

V.

That plaintiffs became, on Feb. 1, 1946, owners of an undivided 4/5ths of the Parks patent in suit, and on July 26, 1948, became the owners of all the right, title, and interest in and to Parks patent No. 2,011,232 and at the time of the filing of the complaint herein and now are the owners of all of the right, title, and interest in the Parks patent No. 2,011,232. Defendants having been assured by plaintiffs' counsel that plaintiff has good title, defendant admits the foregoing.

VI.

That plaintiffs at all times since the issuance thereof, and now, are the owners of all of the right, title, and interest in and to Himes patent No. 2,243,421.

VII.

That on August 9, 1948, plaintiffs in writing notified defendant of infringement of Parks patent No. 2,011,232 and that no written notice was given to defendant as to any charge of infringement of Himes patent 2,243,421, except by serving on defendant the amended complaint herein which was on or about January 5, 1949.

VIII.

That the charge in the complaint that defendant

committed any acts alleged as infringement in knowing, wanton and deliberate disregard of plaintiffs' rights of the two patents in suit is withdrawn.

IX.

That the damages to be awarded to plaintiff for infringement of the Parks patent in suit, if either claims 2 or 5 thereof, or both of said claims, be found to be valid, shall be Fifteen Hundred (\$1,500.00) Dollars.

X.

That in the event claim 1 of Himes patent 2,243,421 shall be found both valid and infringed, the damages to be awarded plaintiff for such infringement of the Himes patent shall be in the nominal amount of One Hundred (\$100.00) Dollars.

XI.

That the prior art patents to be relied upon by the defendant at the trial to show invalidity of claims 2 and 5 of the Parks patent and claim 1 of the Himes patent shall be the following:

Cramer—1,662,698, Mar. 13, 1928; 229-41B, 230.

Filmer (Br.)—345,682, Apr. 2, 1931; 229-41-1, sh. dwg., and 3 sh. spec.

Creasey—1,679,710, Aug. 7, 1928; 229-41A, 251.

Berkowitz—1,700,733, Feb. 5, 1929; 229-39, 99.

Leblanc (Fr.)—425,017, May 31, 1911.

Morris—1,362,129, Dec. 14, 1920.

Neumann—2,017,724, Oct. 15, 1935; 229-41.

Rutledge—805,234, Nov. 21, 1905.

XII.

That plaintiff admits that the Court has jurisdiction of the Counterclaim.

XIII.

That the defenses and issues raised by the defendant, as hereinafter identified, are withdrawn by the defendant:

Answer—Paragraph five, subsections G, H, I, and K; paragraph six, subsections A and B; and

Counterclaim—Paragraph eleven, subsections G, H, I and K, and paragraph twelve, subsections A and B.

Dated at Seattle, Washington, this 30th day of January, 1951.

ADDISON N. HIMES,
ROSS A. HIMES.

ARNOLD & MATHIS,
/s/ CLINTON L. MATHIS,
Their Attorneys.

V. B. CHADWICK,
/s/ FORD C. SMITH,
His Attorney.

[Endorsed]: Filed January 31, 1951.

[Title of District Court and Cause.]

SPECIAL VERDICTS

We, the Jury in the Above-Entitled Cause, Find:

I.

Claim 2 of Parks Pat. 2,011,232 is valid.

II.

Claim 5 of Parks Pat. 2,011,232 is valid.

III.

Claim 1 of Himes Pat. 2,243,421 is infringed.

IV.

Claim 1 of Himes Pat. 2,243,421 is valid.

/s/ HENRY J. YOUNG,
Foreman.

[Endorsed]: Filed February 5, 1951.

[Title of District Court and Cause.]

MOTIONS UNDER RULE 50 AND
MOTION TO DISMISS

Motions Under Rule 50

Defendant renews his motion for directed verdict made at the close of all the evidence and moves for judgment notwithstanding the verdict, that Claims 2 and 5 of the Parks U. S. Patent No. 2,011,232 are invalid; that Claim 1 of the Himes U. S. Patent No. 2,243,421 is invalid; and that Claim 1 of the

Himes U. S. Patent No. 2,243,421 is not infringed.

In the alternative, Defendant moves for a new trial.

The grounds of these motions are as follows:

1. Defendant alleges error in the findings of the jury for the reason that the evidence presented at the trial of this case was clear, cogent and convincing that Parks Claims 2 and 5 and Himes Claim 1 are invalid and that Himes Claim 1 was not infringed. Defendant alleges error in the findings of the jury for the reason that the evidence presented at the trial of this case was clear, cogent and convincing that Parks Claims 2 and 5 and Himes Claim 1 are invalid for want of invention and that they are anticipated by prior patents, prior disclosures in patents, and prior public use in the United States. Defendant alleges error in the findings of the jury for the reason that the evidence presented at the trial of this case was insufficient to justify a verdict of infringement of Himes Claim 1.

2. Defendant alleges error in the findings of the jury for the reason that Instruction 13, to which proper exception was taken, incorrectly stated the law as to anticipation and misled the jury, causing them to improperly find for the Plaintiffs in regard to the validity of Parks Claims 2 and 5 and Himes Claim 1.

3. Defendant alleges error in the finding of the jury as to the question of infringement of Himes Claim 1 because of the exclusion from the jury of

testimony concerning Claim 2 of said Himes Patent. Himes Claim 2 concerns a similar method of folding cartons to that recited in Himes Claim 1, and has been disclaimed; and the jury could not properly interpret Claim 1 and determine its proper coverage without knowledge of the disclaimed subject matter of Claim 2; and the jury was thus led to error concerning the question of infringement of Himes Claim 1.

Motion to Dismiss

Defendant renews his motion made at the trial of this case and moves that the Himes Patent No. 2,243,421, and the claims thereof, be dismissed from the case. Defendant bases this motion on the grounds that during the trial of the case Plaintiff Ross A. Himes, the patentee in said Himes patent, gave testimony clearly showing that he knew that the subject matter of Himes Claim 3 was old and unpatentable, that he knew that Claim 3 was invalid, and that he had unreasonably delayed in making a disclaimer of Claim 3.

Most respectfully submitted,

/s/ DUANE C. BOWEN,

Counsel for Defendant.

Service admitted.

[Endorsed]: Filed February 15, 1951.

[Title of District Court and Cause.]

ORDER

Defendant's motion for judgment in his favor notwithstanding the verdict of the jury is granted. Counsel for defendant will prepare, serve and submit draft of order and judgment.

Dated May 28th, 1951.

/s/ DAL M. LEMMON,

United States District Judge.

Notice of Mailing attached.

[Endorsed]: Filed May 28, 1951.

In the United States District Court, Western
District of Washington, Northern Division

Civil Action No. 2092

ADDISON N. HIMES and ROSS A. HIMES,
Individuals, Doing Business Under the Firm
Name and Style of NOLOX COMPANY OF
AMERICA,

Plaintiffs,

vs.

V. B. CHADWICK, an Individual, Doing Business
Under the Firm Name and Style of COAST
CARTON COMPANY,

Defendant.

FINAL DECREE

This Cause having come on for trial before a jury; and the cause having been tried and evidence

adduced by the Plaintiffs and the Defendant on the issues herein; and the Defendant having duly and regularly moved for a directed verdict at the close of all the evidence and said motion having not been granted, the Court reserving its ruling; and the jury having returned special verdicts on the issues in favor of Plaintiffs; and Defendant having duly and regularly moved to have said verdicts and any judgment entered thereon set aside and for judgment in his favor in accordance with his motion for a directed verdict; and the Court, having considered the written arguments of the parties relative the merits of said motion, concluding as a matter of law in view of the evidence that the claims in issue are invalid and that the claim in issue as to infringement is not infringed; and the Court having granted Defendant's motion for judgment in his favor notwithstanding the verdicts; it is

Ordered, Adjudged and Decreed by the Court as follows:

1. That Claims 2 and 5 of the Parks and Hildenbrand U. S. Patent No. 2,011,232 are invalid.

2. That Claim 1 of the Himes U. S. Patent No. 2,243,421 is invalid.

3. That Claim 1 of the Himes U. S. Patent No. 2,243,421 is not infringed.

4. That the clerk's entry of Judgment on Special Verdicts, made on February 6, 1951, in the Civil Docket be hereby nullified.

5. That an injunction issue out of and under the seal of this Court directed to the Plaintiffs,

their associates, partners, attorneys, clerks, servants, agents, employees and confederates and all in privity with them and each of them, perpetually enjoining them and each of them from instituting or proceeding with, in this or in any other Court, any suits or actions against this Defendant or those holding under him, his successors or assigns and his customers for infringement of either of said United States Letters Patent No. 2,011,232 and No. 2,243,421.

6. That Plaintiffs pay to the Defendant his costs in this suit to be taxed.

Entered this 7th day of June, 1951.

/s/ DAL M. LEMMON,

United States District Judge.

Submitted by:

/s/ FORD E. SMITH,

FORD E. SMITH, and

C. M. McCUNE,

Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed and entered June 8, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that plaintiffs Addison N. Himes and Ross A. Himes, above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order granting defend-

ant's Motion for Judgment Notwithstanding Verdict, dated May 28, 1951, entered in this action on or about May 28, 1951, and the Judgment dated June 7, 1951, entered in this action on or about June 8, 1951.

Dated June 27, 1951.

MELLIN, HANSCOM &
HURSH,

By /s/ JACK E. HURSH,
Attorneys for Plaintiffs.

[Endorsed]: Filed June 27, 1951

[Title of District Court and Cause.]

CONCISE STATEMENT OF THE POINTS ON
WHICH PLAINTIFFS-APPELLANTS IN-
TEND TO RELY ON APPEAL

Come Now plaintiffs-appellants Addison N. Himes and Ross A. Himes, individuals, doing business under the firm name and style of NoloX Company of America, and make the following concise statement of the points upon which they intend to rely for appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment made and entered June 7, 1951, in the above-entitled cause:

1. The court erred in setting aside the verdict of the jury.

2. The court erred in not denying defendant's motion for judgment notwithstanding the verdict

on the ground that there was substantial evidence to support the verdict of the jury.

3. The court erred in setting aside the verdict of the jury because in so doing, plaintiffs-appellants were denied a trial by jury.

4. The court erred in signing and entering the final judgment of June 7, 1951, in that said judgment of June 7, 1951, is against the substantial weight of the evidence.

5. The court erred in holding claims 2 and 5 of United States Letters Patent No. 2,011,232 invalid.

6. The court erred in holding claim 1 of United States Letters Patent No. 2,243,421 invalid.

7. The court erred in holding claim 1 of United States Letters Patent No. 2,243,421 was not infringed.

Dated July 5, 1951.

ARNOLD & MATHIS,
MELLIN & HANSCOM,
By /s/ JACK E. HURSH,
Attorneys for
Plaintiffs-Appellants.

I hereby certify that a copy of the foregoing Concise Statement of the Points on Which Plaintiffs-Appellants Intend to Rely on Appeal has this day been mailed to Ford E. Smith, 734 Central Building, Seattle 4, Washington, and C. M. McCune, 4516 University Way, Seattle 5, Washington, attorneys for defendant-appellee.

/s/ JACK E. HURSH.

July 5, 1951.

[Endorsed]: Filed July 6, 1951.

[Title of District Court and Cause.]

ORDER

Good Cause Appearing Therefor, It Is Hereby Ordered that the time for filing plaintiffs-appellants' transcript of record on appeal in the above-entitled cause is hereby extended to September 20, 1951.

Dated July 24, 1951.

/s/ DAL M. LEMMON,

United States District Judge.

Receipt of Mailing attached.

[Endorsed]: Filed July 24, 1951.

In the District Court of the United States for the
Western District of Washington, Northern
Division

Civil Action No. 2092

ADDISON N. HIMES, and ROSS A. HIMES,
Individuals, Doing Business Under the Firm
Name and Style of Nolo Company of America,
Plaintiffs,

vs.

V. B. CHADWICK, an Individual, Doing Business Under the Firm Name and Style of
COAST CARTON COMPANY,
Defendant.

Before: The Honorable Dal M. Lemmon,
U. S. District Judge, and a jury.

Appearances:

JACK E. HURSH, ESQ., and
OSCAR A. MELLIN ESQ.,
CLINTON L. MATHIS, ESQ.,

Appeared on Behalf of the Plaintiffs.

FORD E. SMITH, ESQ.,
C. M. McCUNE, ESQ.,

Appeared on Behalf of the Defendant.

TRANSCRIPT OF PROCEEDINGS AT TRIAL

January 31, 1951

Whereupon, the following proceedings were had
and testimony taken, to wit: [2*]

* * *

ROSS A. HIMES

a plaintiff herein, called as a witness by and on
behalf of the plaintiff, having been first duly sworn,
was examined and testified as follows:

Direct Examination

By Mr. Mellin:

Q. Will you give your full name, your age and
your residence, Mr. Himes?

A. Ross A. Himes. My age is 51. My residence
is 2607 South Santa Anita Avenue, Arcadia, Cali-
fornia.

Q. You are one of the plaintiffs in this action,
are you? A. I am. [10]

Q. Who is Addison N. Himes?

A. Addison N. Himes is my father.

* Page numbering appearing at top of page of original Reporter's
Transcript of Record.

(Testimony of Ross A. Himes.)

Q. Is he the other plaintiff? A. Yes, sir.

Q. Do you and Addison Himes do business in any fashion as associates?

A. We do business as the Nolox Company of America.

Q. And that is a partnership, is it, sir?

A. That is a partnership.

Q. What is the nature of that business of your father and yours?

A. The nature of the business of the Nolox Company of America is to grant licenses under patents which we have obtained upon my inventions, and receive royalties from the manufacturer under those licenses.

Q. What business were you and your father in prior to this business that you speak of?

A. The manufacture and sales of folding boxes.

Q. What was the name of that business and where was it located?

A. It was the Opening and Folding Paper Box Company, located at 1201 Park Avenue, Emoryville, California.

Q. How long was your father in that business, if you know?

A. My father has been in that business,—was in that business, up until the time we ceased manufacture, for [11] approximately 55 years.

Q. How long were you associated in the manufacture of paper boxes, sir?

A. From 1921 to 1938 would be 17 years.

Q. And '38 is the time when this Nolox Company came into existence, did it?

(Testimony of Ross A. Himes.)

A. The NoloX Company came into existence out of the manufacturing business in 1938; that is the partnership came into existence at that time.

Q. What became of the Oakland Box Company?

A. It was sold.

Q. Is the partnership the plaintiff, the owner of the partnership patent number 2,011,232 granted August 13th, 1935? A. Yes.

Mr. Mellin: I will offer that in evidence, your Honor.

The Clerk: Plaintiffs' Exhibit "1" marked for identification.

(Patent file marked as Plaintiffs' Exhibit "1" for identification.)

Mr. Mellin: Yesterday we noticed that the defendant had marked some of their exhibits with numbers rather than letters. There would be no objection [12] to us to take letters rather than numbers if it would be less confusing to the Court.

(Patent file marked as Plaintiffs' Exhibit "A" for identification, and received in evidence.)

Mr. Mellin: May I at this time also offer into evidence the certified copy of the file wrapper and contents in the matter of the issuance of the Parks patent, Exhibit "A." I offer that certified copy as file wrapper Exhibit "B."

(File wrapper marked as Plaintiffs' Exhibit "B" for identification and received in evidence.)

(Testimony of Ross A. Himes.)

Mr. Mellin: May I state to the jury, your Honor, that the file wrapper is a report of the proceedings in the Patent Office which resulted in arguments back and forth, which resulted in the issuance of the patents.

Are the plaintiffs the owners of the Himes patent number 2,243,421?

The Witness: Yes, sir.

Q. (By Mr. Mellin): Issued to Ross A. Himes, is that you? A. That is me.

Q. On May 27, 1941? A. Yes, sir.

Q. For a paper box and method of making the same? A. Yes, sir. [13]

Mr. Mellin: Number 2,243,421. May I offer this in evidence, your Honor, as plaintiff's Exhibit "C"?

(Patent file marked as Plaintiffs' Exhibit "C" for identification and received in evidence.)

Mr. Mellin: At the same time, your Honor, may I offer a certified copy of the file wrapper and contents in the matter of letters patent of Ross A. Himes, Number 2,243,421, as the next in order?

(Patent file marked as Plaintiffs' Exhibit "D" for identification and received in evidence.)

Mr. Mellin: May I read to the jury slightly from the patent, your Honor?

The Court: Those two claims, do you mean?

Mr. Mellin: No; I am not going to read from

(Testimony of Ross A. Himes.)

the claims, your Honor. I am going to read the general nature of the document.

The Court: All right.

Mr. Mellin: Maybe you have all seen patents, but here is the actual patent itself. It includes a drawing which in this instance illustrates the carton and method of making it, and then has descriptive matter describing how it is done. This says [14] “Whereas, Ross A. Himes, of Piedmont, California, presented to the Commissioner of Patents a petition praying for the grant of letters patent for an alleged new and useful improvement in paper boxes and methods of making the same, a description of which invention is contained in the specification of which a copy is hereunto annexed and made a part hereof, and complied with the various requirements of law in such cases made and provided, and whereas upon due examination made the said Claimant is adjudged to be justly entitled to a patent under the law. Now therefore these letters patent are to grant unto the said Ross A. Himes, his heirs or assigns, for the term of seventeen years from the date of this grant the exclusive right to make, use and vend the said invention throughout the United States and the Territories thereof.” That would be also true of the Parks patent which I will not bother the jury with.

Q. (By Mr. Mellin): You gave me, Mr. Himes, a box made in accordance with the paper box which you advised me was made in accordance with the disclosure of the Parks patent. Will you take the

(Testimony of Ross A. Himes.)

box which I hand you and tell me whether or not that is made in accordance with the disclosure of the Parks patent? A. It is.

Q. Would you show the jury, please, and describe slightly [15] what you are doing and the method of briefly how it is made and how it opens to perform its proposed functions?

Mr. Mellin: May I have that marked for identification, your Honor?

The Court: You may.

The Clerk: Plaintiffs' Exhibit "E" marked for identification.

(Paper carton marked in evidence as Plaintiffs' Exhibit "E" for identification.)

Q. (By Mr. Mellin): I hand you Exhibit "E" and ask you to proceed, please.

A. Ladies and gentlemen of the jury, this box which is known as a Parks box, exhibit "E" in the action here, is folded and glued into its present form—into its flat form—on an automatic gluing machine—folding and gluing machine, at the end of which it emerges in this flat state and is completed for its delivery to and use by manufacturers and packers for packing their articles therein. The advantages of this type of box are, as Mr. Mellin explained briefly some time ago, that when the box is to be used, all that is necessary to erect it for use and for interlocking non-returnable engagement of the bottom sections is to push it slightly on the ends. I think perhaps I had better do that [16] slower.

(Testimony of Ross A. Himes.)

I know how it works. Perhaps you don't. So if the jury will please notice the action of the side bottom panels and the lug extensions thereon, you can see that as the box is pressed from the ends, the arrangement of the bottom panels is such that the lug extensions on the side bottom panels approach one another, slide past one another and as the box reaches the open position, snap past one another which thereafter hold the box in an extended position while being filled; and after having been filled prevent the bottom of the box from falling through. The more pressure, in fact, that is applied to the bottom of this box once it is erected, the tighter the interlock will bite in the center. The mechanical action is such that once those lugs pass one another, and then pressure is applied either upward or downward on the bottom section, the lugs will press back toward one another in the direction from which they came and not allow the box to open. Therefore, in conclusion, it is entirely automatic and entirely load sustaining. Thank you.

Q. If you know, what is the strength of the bottom of the Parks package, exhibit "E" as compared with a box like it made with a solid bottom?

A. It is my opinion, Mr. Mellin, that a Parks box constructed as this one is constructed, once it is [17] erected, presents a stronger, more solid construction to support the contents than if there was simply a plain, glued end construction, formulated on the bottom of the box.

Q. Will you state whether or not it is possible

(Testimony of Ross A. Himes.)

to collapse that carton by upward pressure on the bottom of the box once it is in an erected position?

A. Upward pressure on the bottom of the box will not collapse this carton. The only manner by which this carton can be re-collapsed, once it has been erected is to reach the fingers inside and manually unlock the two lugs. I have just unlocked that with my fingers. Now it will go back and assume its flat form. I might add that usually that is not necessary because the box is not used more than once.

Mr. Mellin: I offer that in evidence.

The Court: Received.

(Exhibit "E" of the plaintiffs received in evidence.)

Mr. Mellin: May I have this marked for identification?

(Cardboard carton marked in evidence as plaintiffs' exhibit "F" for identification.)

Mr. Mellin: I hand you a carton which has been produced by the defendants, and there is no [18] question but what it is the defendant's box—and which we complain of, here, and ask you whether or not you have examined the structure and the method of operation of that box?

A. Yes, I have.

Q. Will you tell us the similarities if any and the differences if any between that box and the box—briefly of course—that you have been speak-

(Testimony of Ross A. Himes.)

ing of as following the disclosure of the Parks patent, exhibit "E"?

A. It functions in exactly the same manner and produces the same result as the Parks box.

Q. What about in construction, and will you demonstrate it to the jury, please?

A. Well, if the jury please, if they will take a look at the bottom of this box and its action, in comparison to what we just saw in the Parks box, you will see that the same pressure applied to the end corners of the box tends to open it. The lugs on the side bottom sections are approaching one another in the same manner. The center interlock is approaching one another in the same manner and when it gets to the center it snaps and locks in the same manner, in the same non-returnable interlocking engagement. Everything that I have said about the Parks box is true of this box. [19]

Mr. Mellin: May I offer that in evidence, your Honor, as the plaintiffs' next in order?

The Court: Yes, you may.

(Plaintiffs' exhibit "F" received in evidence.)

(Paper carton marked in evidence as plaintiffs' exhibit "G" for identification.)

Q. (By Mr. Mellin): By the way, Mr. Himes, you are familiar with the Parks patent and the Himes patent in suit, are you not?

A. Oh, yes.

(Testimony of Ross A. Himes.)

Q. And you rather thoroughly know what they teach and what they disclose?

A. Rather thoroughly.

Q. I show you a box blank and ask you how that compares with the disclosure of the box blank from which the box disclosed in the Parks patent in suit is made?

A. This is an accurately made sample of the disclosures in the drawings of the Parks patent, made according to the drawings in the Parks patent.

Q. As a matter of fact you made it yourself, did you not?

A. As a matter of fact, I made it myself.

Q. Can you briefly demonstrate with that blank how the box is put together—I mean the bottom is put together so it forms a box; that is, the relative relationship of the bottom flaps and so forth? [20]

A. Yes.

Q. Will you do it, briefly?

A. I will be glad to. These boxes are cut and creased in this manner to form this blank. During the process of folding and gluing, these side bottom panels are bent upward onto the inside of the box; the end bottom panels are bent upward onto the inside face of the box, while these glue flap extensions are doubled back into you might say a bellows fold or a double fold upon the flap to which they are attached.

The next process in folding and gluing is to apply glue by glue stencils on the machine, to cooperate areas in the bottom panels adjacent to those double-

(Testimony of Ross A. Himes.)

over flaps. Also glue is applied in a strip along the inside margin of the end panel opposite the other end panel which carries a glue flap to receive and adhere to that glued strip. So approximately half-way through the operation we have the box folded in this form and the glue is applied on the three places that I have just pointed out, after which the box proceeds through the machine in its travel and these end panels are folded over by means of folding belts until this end panel, as you can see, will come over onto the double folded portion, and the glued area will contact the glue flap. And in the same manner at the [21] end of the carton——

Q. May I interrupt you Mr. Himes; when you glue them, will you connect them with these paper clips? A. I will try. I don't believe I can.

Q. All right. Just go ahead. I am sorry that I interrupted you.

A. And similarly at the other end of the carton, the end panel is brought over with the glue flap coming down on the area on which glue has been deposited on the corresponding adjacent panel. Glue as you recall has been applied on the end strip of this panel which makes a contact with the glue flap at the other end of the box, which completes the folding and gluing operation, after which the box is delivered under pressure rollers in the machine to set the glue, squeeze it into the material, and then the boxes are stacked in the end stacking

(Testimony of Ross A. Himes.)

section of a gluing machine where they remain, slowly moving on an endless belt, until they are dried; after which they are taken out finished at the other end, packed in boxes and delivered.

Q. The box as dried is the box that is ready for erection by pressure on opposite corners?

A. That is right, Mr. Mellin, it will make the same box as was first shown to the jury. [22]

(Cardboard carton marked in evidence as plaintiffs' exhibit "H" for identification.)

Q. (By Mr. Mellin): I show you a blank which is a defendant's box opened up and ask you if you will compare the blank that you have just been testifying to which is exhibit "G" for identification, and tell us the differences in construction if any and the differences in operation if any between putting the box together and so forth, leaving out the precision gluing and steps except mention that they are glued together and without the precision machine steps; first, will you start with the difference in construction?

A. I hope the jury can see what I am trying to point out. It is a bit difficult, here. You will notice in viewing these two boxes, starting with the left—on the left side of the box with the side bottom section which is attached to one of the side panels, we have the same lug extension on the side bottom panel in this box.

Q. That is, the Chadwick box?

A. The Chadwick box. As we had in the Parks

(Testimony of Ross A. Himes.)

box, similarly on the outside panel we have the interlocking means depicted on the Chadwick box as we have on the Parks [23] box. It will be noted of course that in the case of the Chadwick box there has been some waste material left on this corner.

Q. Would you mark that "the waste material" please?

A. Yes. I might say that that waste material is in no way necessary to the operation of the box. It can be left on or off, as you will.

Q. Will you mark it in each instance where waste material occurs?

A. In each instance where waste material occurs I will mark the area with an "X."

Up to that point we have the lug sections and the interlocking means the same. The only difference we have found so far is that in the Chadwick box the waste material has been left on whereas in Parks it has been cut off. We also notice on that same panel that attached to those side bottom panels is what we term a glue flap attached to the panel by a diagonal crease line. Similarly on the other side bottom panel we have a glue flap attached by a diagonal crease line. That same construction, the glue flap, attached to one or the other of the panels by a diagonal crease line is carried in this Parks sample on the end panel in each case. That is an unimportant difference. The Parks patent as issued does not specify which panel shall [24] be used to carry the glue flap. All that would be necessary to do, to make these constructions identical with

(Testimony of Ross A. Himes.)

one another, then, would be to carry the glue flap on the Chadwick box on this end panel in the same manner as it is on Parks and carry this one on this side bottom panel on the end panel in the same manner that it is on Parks. That would then cut off this glue panel from these two side bottom sections and place it on the end bottom sections.

Q. I hand you a pair of scissors. Will you cut off the waste material and fold the end flaps to correspond with the showing of the Parks patent and explain what you are doing at the time, of exhibit "H"?

A. You want me to cut off the waste material that has been left on Chadwick?

Q. Yes.

A. And reverse the flaps as they are in Parks?

Q. Correct. Tell the jury what steps it is necessary to do to have that defendant's box blank conform precisely to the Parks disclosure.

A. I have just explained to the jury that these flaps, in order to conform exactly with the Parks construction as shown will have to be on the side bottom panel which would make me identify these flaps as shown on the Chadwick box with an "X" as waste material. [25]

Q. If you will, please.

(Witness draws on exhibit. Witness cuts a piece of the cardboard off.)

A. We shall cut off this corner as being unnecessary; We shall cut off this corner as being

(Testimony of Ross A. Himes.)

unnecessary; we shall cut the glue flaps from the side bottom panels.

Q. (By Mr. Mellin): They are actually waste material as far as the Parks disclosure is concerned, is that right?

A. They will be waste material if they are placed on these panels if there are glue flaps on the other panels.

Q. Now, will you form the glue flaps?

A. I have to form the glue flap on the end panel by simply bending it. (Bending piece of paper.) Now I think we will see the same disclosure in both boxes.

Q. By making those changes in the defendant's blank did you change its method of operation or affect the result in any fashion, Mr. Himes or not?

A. No. It will operate in the same manner and produce the same result, either way. Here we have a direct comparison between the side bottom panels in both cases and between the end bottom panels in both cases. I suppose perhaps I had better cut off a little bit more waste in order to make the picture clearer. This is unnecessary (cutting off piece of paper); and this is [26] unnecessary (cutting off corner of paper).

Now I believe we have it.

Q. Does exhibit "H," as you have changed it by clipping and bending change its operation from that of the defendant's box in exhibit "F"?

A. No, none whatsoever.

Mr. Mellin: I will offer the blanks previously

(Testimony of Ross A. Himes.)

identified in evidence as plaintiffs' exhibits "G" and "H."

The Court: Of course the waste material has been cut off.

Mr. Mellin: And we will clip the waste material to it.

The Court: We will take a recess. Ladies and gentlemen of the jury, you are not to discuss anything in connection with the case between yourselves or permit them to be discussed in your hearing. You are further instructed not to form any opinion upon the merits of the case until the court finally submits it to you for your decision. Might I have a stipulation from counsel that the admonition I have just given to the jury might be deemed as having been given at each recess and confinement of the jury without it being repeated?

Mr. Mellin: Yes, your Honor. [27]

Mr. Smith: Yes, your Honor.

(Plaintiffs' Exhibit "G" received in evidence.)

(Plaintiffs' Exhibit "H" received in evidence.)

(Recess.)

The Court: You may proceed.

(The following proceedings were had within the presence and hearing of the jury.)

Q. (By Mr. Mellin): Did you or anyone on your behalf make any survey to determine that

(Testimony of Ross A. Himes.)

prior to this Parks patent or sometime shortly thereafter there were any commercial boxes which were constructed and operated as you have described in conjunction with the Parks box and the defendant's box? A. There were none.

Q. Will you tell us what you did to determine that fact, if you did anything?

A. We submitted the box to practically all of the largest [28] paper box manufacturers in this country, many of whom were already our licensees on other types of boxes, and met a great deal of enthusiasm right from the start. They assured me that no such box had ever been produced commercially. I had never known of such a box having been produced commercially, myself, and they were quick to accept our licenses which would allow them to manufacture and sell these boxes.

Q. What was the disadvantages, if you know—you are familiar with the boxes of the type of which these boxes became supplanted if they did, which were used for the same purpose; what were those boxes and what were their disadvantages if any?

A. Prior to our introduction of this box, it was a general practice in manufacturing plants where the goods reached the point of packing to have to have a number of employees folding box flanges by hand, and inserting tabs into slots and so on; making the box and finishing the erection of the box by hand and stacking them up in large areas in an upright condition so that they wouldn't be a

(Testimony of Ross A. Himes.)

bottleneck at the end of the delivery belts when the articles were finished and ready to be packed. I have particularly in mind one instance which might be interesting.

In the dairy trade, where so many of these [29] five cent—maybe ten cent now—ice-cream bars are produced, popsicles and such, they had a condition there in what they called the freezer room, where these frozen articles were frozen in the freezers, and could only spend a very small amount of time from the time they were out of the freezers, packed into the boxes and put back into the freezers, so that they wouldn't melt, obviously. Most of these freezer rooms were limited for space. The procedure prior to the introduction of our boxes was for a crew of girls, women, to make up boxes by hand and stack them in an upright, open position all around the room, just giving themselves room to get in and out of the freezer doors, after which they would open the freezer doors, fill the goods into the boxes and put the boxes—the filled boxes—back into the freezer. Then they had to stop the whole operation until another whole room full of boxes was erected by hand. That was the general practice. We have completely changed that procedure in freezer plants because now all that it is necessary to do is to have a stack of our boxes, flat, such as this Parks box. They come to the customer delivered flat in bundles. A bundle is open somewhere in the room. At any time they can open those freezer doors, snap these boxes open, put the goods

(Testimony of Ross A. Himes.)

in them and put them back in [30] the freezer in no time at all. So we have made tremendous savings to not only that industry but to many, many industries where speed of erection of a box at the end of the packing line is an important factor.

Q. Now, you mentioned that there were licensees. Do you know how many licensees the plaintiff has on boxes? A. How many licensees we have?

Q. Yes. A. We have 21.

Q. Do they have more than one at one plant?

A. One has as many as 13. They have more than one at one plant. The number of plants, including the branches of these 21 licensees that are authorized under their licenses to manufacture and sell our boxes amounts to 48.

Q. Since 1946 have those licensees been under that license agreement and have they or have they not been licensed to produce under the Parks patent? A. Yes, they have.

Q. Have they done so or not?

A. All of them have produced boxes in conformance and with the teachings of the Parks box.

Q. Do you recall, Mr. Himes, approximately how many boxes have been produced by your licensees from February 1, 1946, to November 1, 1950? [31]

A. I had that list prepared by my bookkeeper. I don't recall the exact figure—something over three hundred million, I believe.

Q. I hand you a list which you gave me of licensees which are specified on one side; secondly what appears to be the number of boxes made by

(Testimony of Ross A. Himes.)

the licensees and then a third column of the net sales value of the boxes so made by licensees and ask you if that was made from your books—the books of the plaintiff—which were kept in the due course of business?

A. Yes; I ordered this list prepared by our bookkeeper from our books.

Q. And those books are under your control are they? A. They are.

Q. Would you tell us, please, the number of boxes which your licensees have produced shown on that list from February 1st, 1946, to November 1, 1950, the total number of boxes produced?

A. From February 1, 1946, to November 30, 1950, the total number of boxes produced by these licensees amounts to three hundred eighty million, two hundred fifty-two thousand, three hundred and six.

Q. Boxes? A. Boxes.

Q. What was the net sales value of those boxes, the total? [32]

A. The net sales value of those boxes was six million, eight hundred thirty-four thousand, six hundred and one dollars and ninety-three cents.

Q. If you would look at those licensees—do all of those licensees make their boxes following what you said was the disclosure of the Parks patent?

A. Yes, they do.

Q. Do they make all of their boxes that way?

A. Yes.

Q. Would you go down the list and tell us where each one of them is and from your knowledge if

(Testimony of Ross A. Himes.)

they all make Parks boxes or whether they follow one of the other patents or not?

A. Do you want me to read them?

Q. Yes, if you will; I would like the names of the box companies in the record.

A. The American Box Board Company, Grand Rapids, Michigan—in each case do you want the——

Q. No, that is all right, just the name.

A. They are all the same. All of these licensees manufacture their boxes according to the teachings of the Parks patent.

Q. How about the Standard Box Company of Los Angeles?

A. The Standard Paper Box Company of Los Angeles also manufactures boxes in conformity with the teachings of [33] the Parks patent. However, they make a small amount of folding bottom boxes under another of our patents which is disclosed in patent 2242341, one of the other patents in issue in this case, which does not carry an interlock in the center of the box; they make both.

Q. So that these boxes on here would come under either one or both of the two patents in suit?

A. Almost exclusively, with the exception of Standard Paper Box, under the teachings of the Parks patent.

Mr. Mellin: I will offer that list—that compilation in evidence as plaintiffs' exhibit next in order.

(List marked in evidence as plaintiffs' exhibit "I" for identification.)

(Testimony of Ross A. Himes.)

(Plaintiffs' exhibit "I" received in evidence.)

Q. (By Mr. Mellin): You gave me this morning what you told me were representative boxes made by a few of your licensees or a few of the boxes made by them; I hand you that bundle and ask you if those are all boxes made by your licensees and would you pick out those that would not include your description of the Parks patent, if there are any of them there? (Handing bundle of boxes to witness.) [34]

A. These are all representative samples of boxes made by our licensees and they are all made in conformity with the teachings of the Parks patent.

Q. As I understand it, the licensees are licensed—the ones that make the Parks boxes—are licensed under the two Himes patents and the Parks patent?

A. That is right.

(Bundle of boxes marked in evidence as plaintiffs' exhibit "J" for identification.)

(Plaintiffs' exhibit "J" received in evidence.)

Q. (By Mr. Mellin): From your knowledge, what are the various types of products which are packed in these boxes, to your knowledge, by licensees?

A. The list would be too long.

Q. Would you give me some of the extremes?

A. Practically anything that you can think of until it gets too large to be delivered in a folding bottom box.

(Testimony of Ross A. Himes.)

Q. Could you give us a few examples as to heavy and light weight?

A. We are not limited in the Parks construction to great amounts of weight or size. For instance, our licensees produced millions of boxes for the holding and transport of a half a dozen cans of beer. Other boxes are made [35] for beer bottles. We have had samples of boxes made under our licenses for the packing of connecting rods, tacks, tools, machine parts, practically everything you can think of.

Mr. Mellin: If your Honor please, I would like to have this box that I have in my hand marked for identification. Counsel I believe will stipulate it is a double blanked box made two at a time on a Staude Master Gluer, is that correct, counsel?

Mr. Smith: Yes.

(Paper carton marked as plaintiffs' exhibit "K" for identification.)

Mr. Mellin: May I have this marked for identification, Mr. Clerk?

(Single box marked as plaintiffs' exhibit "L" for identification.)

Q. (By Mr. Mellin): I hand you what appears to be a box blank or two boxes, rather, and ask you if you can identify it; and if you will tell us whether or not it is made by the method disclosed in the Himes patent in suit, to your knowledge; that is a box made by your [36] licensee, is it not?

(Testimony of Ross A. Himes.)

A. Yes. It is made according to the teachings of the Parks patent.

Q. Of the what? A. The Parks patent.

Q. Is it made by the method, can you tell, of the Himes patent? A. Yes it is.

Q. I give you another one just like it; can you open it up so as to show us the blank without destroying it?

A. You don't want it torn apart into two boxes; you want it opened up to show the blank?

Q. To show the blank, so you can explain the method of its folding (handing box to witness).

A. (Witness unfolds box.)

Q. From that blank which you have in front of you and from your knowledge of the Himes patent in suit, will you tell us the method which is practiced in forming the two boxes of that double blank starting from putting the paper into the machine?

A. I would be glad to, Mr. Mellin. But I would appreciate a little scotch tape before I start. In taking it apart I have separated the two boxes. (Witness applies pieces of scotch tape to blank box.)

This is what we term a double box blank, as set forth [37] in our patent number 2243421.

Now, I have described to the jury and to the Court the method of folding and gluing a single box a short time ago. The method employed in forming two boxes simultaneously in the one revolution of a machine from this double blank is essentially the same insofar as folding and gluing of the

(Testimony of Ross A. Himes.)

bottom sections inwardly upon the box and then carrying the end assemblies over for gluing to one another with the exception that the bottoms of both boxes are being worked on at the same time. The method would be as follows——

Q. By the way, would you stop there; was it new or old at that time to punch two or more blanks out of a sheet of material as they went through a blanking out die?

A. It was old and has been for many many years to nest two or more blanks on a cutting and creasing press for the purpose of making full use of that cutting and creasing press by cutting out as many boxes as possible on a sheet of material. However, theretofore in that process the boxes were simply cut and creased on the sheet and then were separated into single boxes before they were subjected to folding and gluing. It is new with patent number 2243421 with our invention represented thereby, to so cut and crease boxes so that [38] two remain attached together in pairs during the process of folding and gluing, packing and delivering to the customer.

Q. Would you show the jury how it is done, please?

A. Yes. These blanks are fed from a pile, one at a time, into a folding and gluing machine. They are picked up by the combing wheel from the feeding hopper. As they progress through the machine—again, these bottom panels are folded in on both sides, now, because we have two boxes; and the glue

(Testimony of Ross A. Himes.)

flaps are folded backwards to form the bellow folds on both sides rather than on one side as I indicated in the single operation.

Q. Simultaneous?

A. Approximately simultaneously. Glue is then applied to the panels carrying the glue flaps. Glue is also applied to both ends of the boxes simultaneously to cooperate with the end flaps which you see on the end of the double blank. Then as the box from that condition proceeds through the machine, the end panel assemblies, including both boxes, now, are brought over by means of a folding mechanism, belts, onto the body of the rest of the box. The glue flaps set down onto the areas that have been stencilled with glue; the other end is similarly folded over onto the body of the box including the assemblies, the bottom panels [39] and bottom panel extensions which are the glue flaps, which again sets the cooperating glued areas down onto the glue flaps, delivering the box into the delivery section and the pressure mechanism for setting the glue in that manner. The boxes have not been separated at any time during manufacture; in fact, they are packed and delivered to the customer in this manner.

Q. What is required to take them apart, to make two boxes of them?

A. Just pull them apart.

Q. Is each box then a separate box?

A. Each one is a separate box and will open automatically.

(Testimony of Ross A. Himes.)

Mr. Mellin: The blank which the witness has been testifying from and now has divided into two parts; I will offer the first blank, exhibit "M" in evidence.

(Plaintiffs' exhibit "L" received in evidence.)

(Carton marked in evidence as plaintiffs' exhibit "M" for identification.)

(Plaintiffs' exhibit "M" received in evidence.)

Q. (By Mr. Mellin): I hand you now exhibit "K" for identification, Mr. Himes; I offer you at the same time a duplicate of it. You may be advised that this double blanked box was made on a Staude master gluer. [40] Will you tell us, please if you are familiar with the construction or method of operation of a Staude master gluer?

A. Yes I am.

Q. Are you familiar with the manner in which that will fold and glue boxes? A. Thoroughly.

Q. Therefore, would you tell us please whether or not, after you—you have examined exhibit "K" before, haven't you?

A. Yes, I have examined exhibit "K."

Q. Would you tell us, please, the differences if any and the similarities if any between the manufacture of exhibit "K" on a Staude master gluer and that which you have just explained as the process of manufacturing a double box such as exhibit "L"?

(Testimony of Ross A. Himes.)

A. The method followed is exactly the same.

Q. Exactly the same?

A. Exactly the same.

Q. Would you open up the clear blank that I gave you——

Mr. Mellin: May I have that marked for identification as exhibit “K-1” your Honor so that they will be together?

The Court: Very well.

(Box marked in evidence as plaintiffs’ exhibit “K-1” for identification.) [41]

Q. (By Mr. Mellin): Would you open that up and answer a few questions for me, please?

A. Open it up into a blank form?

Q. Yes.

(Witness opens up folded form into an unfolded blank form.)

Q. (By Mr. Mellin): From your examination and your knowledge of the Himes patent in suit and your knowledge of the Staude master gluer, would you tell us whether or not the method used to produce the double box, which is before you marked plaintiffs’ exhibit “K” and exhibit “K-1,” employed a method of making said boxes from double blanks from which each cut and creased to form two box blanks having their box bottom forming parts at opposite sides of the double blank?

A. Yes.

Mr. Mellin: By the way may I advise counsel that I am reading elements of claim 1 of the Himes patent, your Honor?

(Testimony of Ross A. Himes.)

The Court: Yes.

Q. (By Mr. Mellin): Is each box blank cut and creased to form hingedly connected side and end walls connected in end to end series? A. Yes.

Q. As pointed out by you?

A. As pointed out by me. [42]

Q. Will you tell me whether or not the bottom sections form respectively the side and end walls?

A. They do.

Q. Will you tell us whether or not the two bottom sections each have a flap extension connected to an end thereof by a diagonal crease near and extending toward an adjacent inner corner of such section? A. Yes.

Q. What line is that?

A. That is these, (indicating)—lines.

Q. Would you tell us whether or not the walls of each box blank opens corresponding walls of the other box blank of the double blank—will you tell us what that is?

A. That means that these walls are opposite one another, these are opposite one another and these are opposite one another; corresponding walls of the two separate box blanks.

Q. Will you tell us whether or not the method employed in manufacturing the box “K” and “K-1” comprise the folding of said extension on the lower faces of the section to which they are respectively employed? A. Yes.

Q. Would you show us what is meant by that, please?

(Testimony of Ross A. Himes.)

A. When we speak of the extensions, we are speaking of these glue flaps. In each case when those are folded, no matter what machines the box would be made on, it is [43] necessary to fold those flap sections onto the bottom face of the flap to which it is attached in order to create the bellows fold or the double fold which I referred to earlier.

Q. When you say "Bottom face" do you or do you not mean the lower face?

A. It is the lower face of the box.

Q. Would you state whether or not the method then requires you to fold the respective bottom sections flat upon the upward faces of the connecting walls respectively, thereby to upwardly expose the flap sections?

A. Yes—I upwardly fold the flap sections, when these are folded in (indicating).

Q. Would you state whether or not that requires folding each assembly at the ends of the series upon the assembly series adjacent thereto, to cause said flap sections to engage cooperating areas of the adjacent assembly, respectively?

A. Yes, in this manner (illustrating).

Q. Does that method or does it not then require that you "glue said flap extensions to said areas"?

A. Yes.

Q. Then will you state whether you adhesively and hingedly connect the free end edges of the series of the walls [44] of the box?

A. Yes; that is accomplished by the application of glue on one end and the extension of glue flaps

on the other end by coming together in the final position and are glued, so (indicating).

Mr. Mellin: May I offer "K" and "K-1" in evidence?

(Plaintiffs' exhibits "K" and "K-1" received in evidence.)

Q. (By Mr. Mellin): Is exhibit "L" a representative sample of two boxes made at the same time by your licensees—those that make them two at the same time? A. Yes.

Q. What are the advantages, if there are any, Mr. Himes, in making these boxes two at a time as you have explained to us?

A. The advantage, Mr. Mellin, is almost entirely a manufacturing advantage. Obviously if you have a folding and gluing machine which has been built to produce one box or perhaps I should say fold and glue one box in a given time or a revolution of that machine, and by delivering double blanks to produce double boxes into the machine, and having two boxes made in the same [45] amount of time or in the same one revolution of the machine, that was formerly necessary to produce one box, you have doubled your machine time—doubled your production on that machine. That was the objective and that is what we accomplished producing the double box.

Q. Are there any other advantages? Are there any disadvantages?

A. There are no disadvantages.

(Testimony of Ross A. Himes.)

Q. Are there any disadvantages in delivering the boxes to the customer clipped together?

A. We haven't discovered any.

Mr. Mellin: Your Honor, the stipulation with regard to exhibit "K" was that the defendant manufactured exhibit "K" and ones like it on a Staude master gluer. Did you understand it that way? Mr. Hursh thought perhaps the stipulation wasn't clear, Mr. Smith.

Mr. Smith: As I understand the stipulation, exhibit "K" is the product of the defendant, we agree on that, and it was manufactured on a Staude master folding machine.

Mr. Mellin: Thank you. I just wanted to be sure that it was clear because it apparently wasn't clear to my associate. [46]

Mr. Smith: Yes.

Mr. Mellin: You may cross-examine.

Mr. Smith: Your Honor, it is now about five minutes of twelve.

The Court: Very well. Recess.

(At 11:55 a.m. o'clock, Wednesday, January 31, 1951, court proceedings recessed to 2:00 p.m. o'clock in the United States Courthouse.) [47]

Seattle, Washington, January 31, 1951
2:00 o'Clock P.M.

(All parties present as before.)

The Court: You may proceed, gentlemen.

ROSS A. HIMES

Cross-Examination

(Resumed)

By Mr. Smith:

Q. Mr. Himes, I believe you testified that you first engaged in the box business in 1921, is that right? A. That is right.

Q. And that that engagement in that business extended how long?

A. That engagement extended to the present time—not full time, however. There were some periods when I was away from the box business and then returned to it.

Q. When, for example?

A. The period between 1923 and about 1933.

Q. 10 years? A. About 10 years.

Q. What did you do during that period of time? [48] A. I was an actor.

Q. At the present time you and your father are the sole partners of this Nolox Company, is that correct? A. Yes.

Q. Do you have any other activities than the activities of that company? A. None.

Q. You spend all of your time on the affairs of the Nolox Company, is that right?

A. That is right.

Q. You regularly attend your office every day, is that right?

A. Our home office is in Emoryville and I live at the other end of the State. No, I do not attend the office every day; no, it is not necessary.

(Testimony of Ross A. Himes.)

Q. It is a business that may be operated by at least that remote a control, is that right?

A. Yes. I maintain an office in my home.

Q. The principal business of the NoloX Company, as I understand your testimony, is the licensing of this patent and other patents that you own, is that right?

A. Yes.

Q. You do not manufacture boxes?

A. Not now.

Q. No. And you have not since when? [49]

A. 1936.

Q. That is 13 years you have not manufactured boxes, yourself?

A. Yes.

Q. Did you ever know this man Parks of whom you have spoken this morning?

A. No.

Q. Or Hildebrand?

A. No.

Q. When did you first become aware of the existence of the Parks patent?

A. In 1943.

Q. How did you become aware of it?

A. I became aware of it during the course of a court procedure in Chicago, Illinois.

Q. What was the nature of that procedure?

A. It was an infringement procedure.

Q. Were you the plaintiff?

A. We were the plaintiffs.

Q. How did it come into that proceedings?

A. It was submitted by the defendants.

Q. In what capacity?

A. In evidence.

Q. In evidence, what kind of evidence?

A. I think it would be sufficient to say that that suit, [50] that action, was settled in the second day.

(Testimony of Ross A. Himes.)

The defendant asked for and was granted a license, and now is one of our business licensees under the Parks patent as well as under the Himes patent, it having been brought to our attention during that period that this Parks patent was in existence, and we having concluded from an examination of the Parks patent that a patent of our own—namely, patent 2284283—

Q. Not involved here, though?

A. Not involved here—read upon the disclosures of Parks patent. We wanting to respect anyone else's invention and not wanting to do anything that might put us in the position of infringing, ourselves—we immediately made an effort to and did purchase the Parks patent as soon as possible.

Q. What do you mean by the words "Read on" the Parks patent?

A. It was made according to the teachings of the Parks patent.

Q. In other words, there was language in your patent which when read, looking at the Parks patent, you found a response in the Parks patent, is that right?

A. Yes. We found that the Parks patent was a much stronger and of course prior patent to ours and the construction that we had covered with improvements in our own patent just mentioned. [51]

Q. In other words your patent then was limited by what you found in the Parks patent, is that right?

A. Our patent was limited?

Q. The patent that you had in suit, which you

(Testimony of Ross A. Himes.)

were reading upon the Parks patent, would be limited by what was found in the Parks patent, is that right?

A. That is true at that time, yes. We became the owners of the Parks patent.

Q. Isn't it true, then, that in considering any patent and whether or not it is valid, we consider what went before it? A. I believe so.

Q. Using the language of the profession, you might say, the later patent has to be viewed having the prior art before it, is that right? A. Yes.

Q. And the Parks patent was prior art to your Himes patent that you had in suit in Chicago?

A. Yes.

Q. What year was that action in Chicago?

A. 1943.

Q. What did you then start to do with respect to the Parks patent?

A. What did we then start to do?

Q. Yes. You have testified that you acquired title to it, [52] but what I am trying to get is, your testimony was that you acquired four-fifths of the title in 1946; what did you do between '43 and '46?

A. A great deal of the time I was in the army.

Q. I see. You were not trying to buy the Parks patent during that time?

A. Yes. We were trying to buy the Parks patent starting in 1943. The history of that purchase is quite a history. There were numerous owners, and those owners had to be tracked down and lo-

(Testimony of Ross A. Himes.)

cated in various parts of the Middle West. That accounts for our inability to complete the purchase of the last one-fifth until somewhere near 1948.

Q. And at the present time you believe you own one hundred per cent of the patent, is that right?

A. We do own one hundred per cent of the patent.

Q. What did you learn about the Parks patent in connection with its acquisition; was that invention ever used prior to your acquiring the patent?

A. It was never used commercially.

Q. When did the first commercial use take place?

A. To my knowledge, the first commercial use took place when we acquired the Parks patent and divulged it to our already established licensees on the Himes patents.

Q. That was sometime after 1946, is that [53] right?

A. I will have to clarify that this way: When you refer to the Parks patent, I assume that you are referring to the teachings of the Parks patent.

Q. Yes, sir.

A. And as I have already told you, we granted in 1943 that our own patent was made according to the teachings of Parks which stimulated us to buy Parks. I would then have to answer your question by saying that there were a great many Parks boxes—boxes made according to the teaching of Parks, made well before 1943.

Q. By whom?

(Testimony of Ross A. Himes.)

A. By our licensees. They were made according to the construction disclosed in the Himes patent which, if you will recall, followed the teachings of Parks; so I must refer to them as Parks boxes even though we didn't know until 1943 that they would be Parks boxes.

Q. Then actually they were dominated by the Parks patent at the time they were made, is that right?

A. Yes.

Q. That is what I understand you to say—that those many boxes before 1946, made according to the teachings of the Parks patent would have been infringements of the Parks patent, is that right?

A. That is right. That is why we made every effort to buy the Parks patent and succeeded in doing so. [54]

Q. And they were made by your licensees, is that right?

A. That is right.

Q. Then your licensees were infringing the Parks patent, probably?

A. Probably.

Q. Insofar as the owners of the Parks patent were concerned the patent was not being enforced, is that right?

A. They had shelved it. They did not use it. They attached no value to it.

Q. You might say that it was a paper patent, is that right?

A. I don't know what you mean by that term, sir.

Q. It was an unused patent so far as the owners were concerned?

(Testimony of Ross A. Himes.)

A. It was a patent which they had invented to be used and had been discouraged from pushing. In the first place, it must be remembered that at that time there was no machine capable of folding and gluing a Parks box until we invented and manufactured that machine under separate machine patents. I invented the machine that would make such a box.

Q. All by yourself?

A. No, not entirely by myself. I had the co-operation of very good machine builders and very good draftsmen. I spent two years in Boston, Massachusetts, for that purpose. The invention was mine, however—assisted [55] by good drafting and machine work.

Q. This is the box marked plaintiffs' "E" and this is known as plaintiffs' Exhibit "G." As I understand your testimony, those two boxes,—the one you have in your hand was made by yourself, is that correct?

A. This is a hand-made sample made by myself.

Q. I don't know what the testimony was about that flat model; did you make that one, too?

A. For your information I also made this one, sir.

Q. In making those, what information in the Parks patent did you rely upon to lay that out and cut it and glue it and so forth?

A. I followed the drawings depicted in the Parks patent, on the first page thereof, precisely.

Q. This is plaintiffs' Exhibit "A," which is a

(Testimony of Ross A. Himes.)

certified copy of the Parks patent. I call your attention to the second page and ask: Is this the drawing you are talking about? A. Yes.

Q. I note that the scale of the drawing is rather small; is that not correct?

A. Well, it would have to be small. It is hard to find a box that size.

Q. How do we get from this small drawing to this large piece of paper? [56]

A. You draw it in proportion; you raise your scale.

Q. You then adopt some proportion of one to ten or one to fifteen or something else?

A. That is right.

Q. What was the proportion that you adopted, there?

A. I can't recall that at the moment.

Q. How did you enlarge that in converting it from one to the other? A. By measurement.

Q. Did you use a ruler? A. Yes.

Q. If you found something in that drawing that measured a half an inch and the proportion was going to be twenty to one then you would have that same thing in your model ten inches; is that what you mean by proportional enlargement?

A. Are you speaking of this model, now?

Q. No; I am speaking of the large flat one that is before you there.

A. I would answer your question yes in regards to this model. This flat model was made to conform

(Testimony of Ross A. Himes.)

in size and shape to a similarly sized and shaped Chadwick box for the purposes of comparison.

Q. Is this the one that you were making it conform to? A. Yes, sir. [57]

Q. I believe this is Exhibit "H" (handing to witness)?

A. You will note that that is the same size throughout.

Q. I see. Then this Parks model lying underneath was purposely made to conform to the Chadwick model for the purpose of that demonstration you made this morning; is that right?

A. As to the size and shape, yes.

Q. And if that bottom, the Parks model laying out here flat and glued up, it would not necessarily come out to this exact proportion; is that right?

A. This Parks box?

Q. Yes. A. Yes, it would.

Q. It would be exactly proportional as this?

A. Do you mean exactly proportional to this drawing or would it function in the same manner and accomplish the same results?

Q. I am asking you in exact proportion to the drawings?

A. No, I don't think it would. I haven't determined that.

Q. Why do you feel you have the liberty to change these things?

A. I have the liberty to change these things because in the box business you can't form the same

(Testimony of Ross A. Himes.)

size box for different sized articles. You must have different sized boxes for different goods. [58]

Q. We will grant you that. Now will you go on and explain why you feel you have the privilege to alter the dimensions of these boxes to fit this defendant's carton?

A. Why don't I have the liberty?

Q. I am asking the questions.

A. Because both of these boxes are true copies of the disclosures of the Parks patent; whether it is the drawings, specifications or claims.

Q. Then what you are trying to say is this, is it not: That being a man of long experience in the box business, you have a skill, you have a knowledge of the box business and you can look at a drawing such as the Parks drawing and transpose that into a physical model to meet a demand of the customer or the demand of the occasion; is that right?

A. That is a very necessary part of box making.

Q. That is just an exercise of your normal skill, is that right?

A. Yes.

Q. It doesn't require anything more than that; you don't have to be an inventor to do that?

A. To copy, no.

Q. To convert from a drawing to a physical model even though in converting you don't use the same proportions? [59]

A. No, I don't have to have any particular inventive ability to do that.

Q. Is the Parks box what is known as an automatic box?

A. Yes, it is an automatic box.

(Testimony of Ross A. Himes.)

Q. Is there something about it that distinguishes it from other kinds of automatic boxes?

A. Yes; many things.

Q. Will you name one, for example?

A. In comparison to what other box, please?

Q. Oh, the Chadwick box as you found it before you cut off the waste material?

A. I have pretty well covered the differences and similarities, it seems, between the Parks box and the Chadwick box in this morning's testimony.

Q. Would you care to repeat them?

A. I wouldn't mind repeating them.

Q. Will you, please?

A. Not having means of reattaching my waste material I will have to refer to the sections that were cut off.

Q. I think we can facilitate that a little bit and,—we will introduce another blank which is just as it comes from the blanking machine.

(Blank box marked in evidence as Defendant's Exhibit "1" for identification.)

Q. (By Mr. Smith): Now, that has the parts that were [60] detached before earlier, is that right?

A. Yes, that is right. I will have to ask for the scissors and a pencil again, if you want me to repeat it.

Q. I will not ask you to mutilate that particular model; I am asking you to point out the differences you find in your box and your model of the Parks patent lying underneath.

A. Well, to repeat: Starting with the side bot-

(Testimony of Ross A. Himes.)

tom section on the left-hand end of the blank, it will be noted that that side bottom section of the box carries a central notch and a lug extending beyond an imaginary line between that center and the other corner of the section of the box adjacent to the other side of the lug. It will be noted that in the case of the Parks box, the extra or waste material on the corner thereof has been cut off. In the case of the Chadwick box, that corner of waste material has been left on.

Proceeding to the other end of that same panel, in the Parks box the glue flap attached to its panel is attached to an end bottom panel, whereas in the Parks box it is attached to a side bottom panel. In order to make these similar, the glue flap attached by that diagonal line would have to be cut off and re-created on the end panel adjacent to it. That same procedure applies to the other side bottom panel where [61] this waste material is cut off, the glue flap is cut off and placed over on the end bottom panel and a strip of waste material also is cut off of the bottom of each of the end bottom panels beyond the confluence of the two angle lines which would be created by so moving the glue flaps.

Q. Those are differences which you see, is that right? A. That is right.

Q. You say that in reconstituting the underneath box of the defendant to the structure of the Parks patent, we take and make a diagonal crease line, here, to give it the part that is similar to that; is that right? A. That is right.

(Testimony of Ross A. Himes.)

Q. Then this triangular piece that is going to be in here and is going to be used for the purpose here no longer functions in the box in the manner in which it does in the defendant's box; is that right?

A. It will function in identically the same manner because it doesn't make any difference to that structure whether it is on a Parks box or on a Chadwick box, on which of those two adjacent panels that glue strip is carried. The functional purpose is accomplished in the same manner whether that is carried on the side bottom panel or the bottom panel. If you are familiar with the Parks patent you know there is no differentiation made [62] on the panel of where those glue parts shall be carried.

We are speaking throughout the patent of two bottom panels—not four—two; each consisting of two bottom panels joined together to form this construction. It doesn't specify how they are joined together, that is, which of the panels carries the diagonal crease line.

Q. This part, then, that we have taken from defendant's box and used for a flap instead of the flap that is here does have a use in this box, does it not?

A. It is unnecessary; it is waste material in my opinion.

Q. It prevented you from folding that box down until you put your hand in there, didn't it?

A. Yes. People have seldom folded them back down once they are up.

(Testimony of Ross A. Himes.)

Q. These are the several boxes, Exhibit "J," and these several boxes I believe you testified were manufactured by licensees of yours?

A. That is right.

Q. Can you tell me whether or not they have a similar flap to one that you are going to use for another purpose?

A. Yes, they have.

Q. It is still waste material, in your opinion?

A. Still waste material. It is easier to leave it on than [63] it is to cut it off.

Q. I believe the Clerk informed me that there were ten; how many of these have that same element in this; does that one?

A. Yes.

Q. Does this next one?

A. Yes.

Q. All waste material?

A. Very probably all of them. I would be glad to tell you why.

Q. Does this one?

A. Yes.

Q. Doesn't that have a timing function in holding the parts of that box so when it is opened—

A. Not a timing function. It might possibly have some additional supporting function. We recognize that in our patent 2,284,283 which I have just explained to you, we followed the teachings of the Parks patent. The greater number of our licensees were established and operating under this Himes patent, just mentioned, before we acquired Parks. This Himes patent just mentioned included such an additional piece of material in its drawing and in the instructions we sent to our licensees for their manufacture of the boxes.

(Testimony of Ross A. Himes.)

Their habit therefore was to leave that piece [64] of material on, not to cut it off. It is just as easy to leave it on as it is to cut it off because as I say, it is waste material.

Q. Is it not a fact, though, that it does rub on the side wall of the box as the box is being erected?

A. Is it not a fact, that it does rub on the side wall of the box as the box is being erected?

Q. As we go through it?

A. It scrapes against the side panels until it reaches the horizontal position.

Q. There is no such arrangement as that shown in the Parks patent, is there? A. No.

Q. That is shown in the Himes patent?

A. That is one of the patents that we licensed over the Parks patent. Our licensees make use of not only the Parks patent but all of the Himes patents, too.

Q. When you issue a license do you furnish the licensees with samples?

A. With samples and detail drawings and instructions on how to manufacture.

Q. How to make the dies?

A. I am a die-maker. I usually go to the plants and instruct them how to use it.

Q. Therefore you were instructing your licensees how to [65] infringe the Parks patent; is that right?

A. I am afraid so, Mr. Smith; I might say unknowingly.

(Testimony of Ross A. Himes.)

Q. Is your ignorance excusable, however—an excuse, shall we say?

A. I don't believe that is for me to determine.

Q. However, upon your discovery of the existence of the Parks patent—in 1943, I believe you said?

A. 1943, yes, sir.

Q. —you became interested in acquiring title to it?

A. Very much interested, yes, sir.

Q. And it was for some primary reason, is that not right?

A. Oh, yes.

Q. In other words, we don't ever want to have something unless we have a reason for it; isn't that right?

A. We did not want to put ourselves in the position of infringing anyone else's invention.

Q. Possibly to protect the interest of your licensees?

A. Yes.

Q. What was there in the Parks patent that gave you concern in that respect?

A. In what respect, Mr. Smith?

Q. That you felt that you had to go out and protect your licensees' interest and you own interest?

A. I would say the entire patent gave us concern. We could see quite clearly that our licensees would be infringing [66] the Parks construction. We didn't want to have them in that position, so we purchased the Parks patent.

Q. How did your licensees infringe the Parks patent—by making boxes, is that right?

A. Yes, I guess that is right.

Q. We will say with four walls—was that the infringing feature?

(Testimony of Ross A. Himes.)

A. By making boxes with four walls?

Q. Yes. A. Oh, no.

Q. That is because the four walls were old?

A. A box with four walls, of course, was very old.

Q. And a box with a bottom was old?

A. A box with a bottom was old.

Q. Therefore they couldn't have infringed that feature, could they? A. No.

Q. A box with an automatic bottom, was that new or old at that time?

A. A box with a truly automatic bottom which when opened resulted in non-returnable inter-locking engagement of the bottom panels was new with Parks. When I invented the Himes patent I thought it was new with Himes. Therein you have your answer.

Q. I think we could paraphrase it fairly to say it was the [67] locking feature in the bottom; is that right?

A. The automatic locking feature against non-returnable engagement.

Q. Then we had at that time boxes with automatic boxes that closed down but they would collapse back up again if you pulled them upward; is that right?

A. Yes. I believe there were boxes—to my knowledge not in commercial production, however. Because as I pointed out we invented and produced the first machine to make that kind of boxes. But there were boxes that could be considered opened

(Testimony of Ross A. Himes.)

automatically but not inter-locked against re-collapse.

Q. The thing that distinguished the Parks box in your mind and made it so that you wanted to buy it was this non-returnable locking of the bottom; is that right?

A. The automatic non-returnable locking of the bottom, yes.

Q. Which will lie dormant and, so far as you know, had never been used by the patent owners up to that time?

A. To my knowledge, and from my investigation and information from many, many very important people in the box business or licensees mostly—to their knowledge and to mine that box had never been produced commercially. That probably accounts for us not having seen it prior to that [68] date.

Q. Do you insist that a box has to be produced commercially in order for it to be effective to teach us what might be in a patent showing that same box?

A. There are a number of different ways of looking at that; and being a practical box maker, I can't look at it any way but as follows: Whatever other so-called automatic boxes might have been laying in the patent files prior to that date, but not produced commercially, those constructions were available to the box-making trade generally and our licensees in particular. They are pretty smart men, most of them; they know the folding bottom box art.

(Testimony of Ross A. Himes.)

Those boxes were available to those men and to those concerns to make and manufacture and deliver without the payment of royalties. But instead they choose to accept our license and pay us royalties for all these years, under our patents, in order to make our box.

Q. So far as your licensees at that time were concerned, they believed, did they not, that under your license they had a right to make a box just as you see it there or modify it as you tell us you modified it?

A. I don't believe that they did. I wouldn't be certain, but I don't believe they were any more familiar with the Parks box than I was at that time. They were familiar with the Himes box, which I will repeat we recognized in [69] 1943 followed the teachings of Parks. That again accounts for the Himes construction rather than specifically the Parks construction being followed in all of these samples which you just had on the table, here.

Q. And in 1943 you probably then came to the conclusion that the Parks patent dominated the licenses that you were making?

A. We came to that conclusion.

Q. It also, did it not, anticipated your own patent which you were making in Chicago?

Mr. Mellin: If your Honor please, the word "anticipate" is a legal term.

Mr. Smith: I agree.

Q. (By Mr. Smith): With that change will you answer that question?

(Testimony of Ross A. Himes.)

A. Do you want to rephrase the question?

Q. We have just agreed that you concluded that the Parks patent dominated you and your licensees in 1943; is that right? A. That is true.

Q. Did you not also then conclude that the Parks patent topped what you thought you had patented in the Himes patent in 1943?

A. In part. [70]

Q. You say in part; apparently not all. How much did it dominate—where did it dominate?

A. It dominated the automatic non-returnable engagement feature. However, beyond that—over and above the Parks construction—we have certain features described and claimed in the Himes patent beyond the teaching of Parks which we thought were quite valuable, one of which was that little corner that you saw me scraping against the sides as it went down a while ago.

Q. We will just forget about that for the moment. It dominated the locking bottom and apparently taught the locking bottom, then; I mean it can't dominate it without teaching in the patent the thing it is going to dominate, can it?

A. It taught it.

Q. It taught it. And that existed from the date of this patent, which is 1935; is that right?

A. I just don't recall. It is down there.

Q. Well, would you say yourself as to the date, 1935? A. Yes; August 13, 1935.

Q. Do you consider a patent public knowledge?

A. Public knowledge?

(Testimony of Ross A. Himes.)

Q. What is contained in a patent, is that public knowledge? A. I don't understand.

Q. The existence of that patent from 1935, is that not [71] evidence that this thing which is disclosed here was known since 1935?

A. It might be known and it might not. It would only be known—only be sure to be known if someone was interested in that particular type of thing and made numerous searches.

Q. What do you mean by "searches"?

A. Well, searches for that kind of art.

Q. Where do you search?

A. Well, you might search perhaps in the patent office, Washington, D. C.

Q. How do you search?

A. I don't know that.

Q. How did you happen to use the term, then?

A. I have been quite familiar with that and similar terms in connection with patents for a good many years, Mr. Smith. I have, of course, taken out many patents, and those patents have been prosecuted, and that term comes to be—I knew as simply a layman, at the beginning—the first thing you do before you take out a patent is to instruct your attorneys to make a search of the records, a search of the patent office.

Q. Does the law require you to do that?

A. I don't believe the law requires you to do that; I am not sure. [72]

Q. Are there any searches that you know of

(Testimony of Ross A. Himes.)

that were made besides the one that you instruct your attorney to make?

A. Oh, you might ask questions; I don't know from whom.

Q. Do you search through the trade catalogues?

A. You might search through the trade catalogues. It might be that they would have a page given over to that sort of thing. I don't know. I have never seen such. It is possible they would be.

Q. Do you examine your competitors' products if you are a manufacturer?

A. I suppose that is the general procedure, yes.

Q. In the instance when you made application for the patent on which you brought suit in Chicago in 1943, did your attorney make a search there?

A. I believe he did.

Q. Did he then discover the Parks patent?

A. I don't know. That is what I hire attorneys for—prosecuting——

Q. Doesn't your attorney keep you informed of what takes place?

A. Not to that degree, no. I allow my attorneys to prosecute for patents. I pay the bills when he is through.

Q. And you also instructed an attorney to bring a suit in Chicago, didn't you? [73] A. Yes.

Q. And the defendant in that case produced the Parks patent, did he not?

A. He didn't produce the Parks patent in court. He brought it to our attention.

(Testimony of Ross A. Himes.)

Q. Well, you learned of it there for the first time?

A. We learned of it through the defense in that case, that is right.

Q. Had you known of it before, would you have had any doubt about bringing that action in Chicago? A. Probably.

Q. You have mentioned from time to time that you have worked in the development of folding machines. When was the first practical folding machine developed, to your estimation?

A. For the folding of what?

Q. Folding of paper boxes.

A. Folding of paper boxes in general terms?

Q. Yes.

A. I should say somewhere in the first ten years of this century.

Q. 1900—to 1910?

A. That would be my guess.

Q. Prior to that time how were boxes folded and assembled?

A. They were folded and glued by hand and then run through [74] what we refer to in the trade as a 4-roller gluer, which merely sets the glue into the material.

Q. How old are you? A. 51.

Q. How could you know what took place in 1900 to 1910?

A. I have a father who had been in the box business 55 years when he retired, and he is a very glib talker, Mr. Smith. I was thoroughly instructed in the box art by the time I was 15.

(Testimony of Ross A. Himes.)

Q. Assuming that back in the days when hand folding was taking place and you had a box like this—a Parks box before you—it would be laying on the table, I assume, before the operator; is that right?

A. Yes; a pile would probably be laying there.

Q. And he or she would probably have a glue pot some place near? A. Yes, and a brush.

Q. What would they do first?

A. If they wanted to make this box by hand?

Q. Yes, if they wanted to assemble that box by hand?

A. This is prior to folding and gluing machines?

Q. Yes.

A. Well, I dare say they would do the same thing that I described this morning, only by hand; in other words, they would fold over these bottom panels and fold the [75] glue flaps back onto the bottom panels to which they are attached. They would apply glue to either the glue flap or to the corresponding area, whichever is to receive it.

Q. It doesn't make any difference to which area the glue is attached?

A. That is right. Then they would take a brush and apply glue along one edge, here, and then they would fold and assemble these onto the body of the box so that the glued areas would meet the glue flaps. The end of the box, carrying the glue strip, would meet the glue flap and it would be manually pushed into this 4-roller gluer which would roll it and deliver it onto a table on the other side.

(Testimony of Ross A. Himes.)

Q. Where it might be put in clamps in addition, is that right—between weights or under weights?

A. It could be—under weights.

Q. Will you show the jury what the hand operation would be in getting it from the flat to this folded-over position that you were speaking about?

A. From the flat to the folded-over position?

Q. Yes, sir. A. By hand?

Q. Yes, sir.

A. You probably would do it with two hands. You want this [76] to be held back and this to be held down; that it would seem to me is the simplest way to do it.

Q. Simultaneously one part is turning 190 degrees into the box and glue flap is turning back; is that right?

A. One operator might choose to turn these down first and then this over; another one might choose to turn all of these up and then turn these back. I don't see that it would make any difference. The method followed is the same in all cases.

Q. Now, this morning you testified that with respect to this mold which was once two boxes joined together—but I believe you actually tore this one apart to show the jury what was taking place?

A. Well, it came apart and then put it back together.

Q. Then it was old for many, many years to make two boxes so that the lid parts all nested together; is that right?

A. That is too broad a question. It was old to

(Testimony of Ross A. Himes.)

cut and crease any number that would fit on a sheet. But it certainly was not old, until we did it, to cut and crease two boxes joined together in pairs in that manner, nicking the knives so that they would remain in pairs and continue to remain joined during the process of folding, gluing, stacking, wrapping, tying and delivering to the [77] customer.

Q. Can you point for the benefit of the jury on that Plaintiffs' Exhibit "K-1" what you mean by the "nicking of the knives"?

A. Yes, gladly. When boxes are cut and creased on a cutting and creasing press, the design is cut out and any intermediate cuts are made within the blank by means of steel knives held in place by sections of plywood, and it is all locked up tight and firmly so it won't fall apart under the pressure of the press.

All of the creases throughout that you see are accomplished in the same manner except a creasing rule is used instead of a cutting rule. So that when the pressure of the press comes on through the board which is up against the die, composed of the wood and steel knives and steel rules, we get the impression of a crease rather than a cut. Now, Mr. Smith asked me to identify the nicks which hold these two boxes together. Nicks are just what they sound like. They are actually nicks made with some instrument in the knives so that when that particular portion of the knife reaches the paper board, it will not cut; it will leave a little joiner or nick joining the two boxes together along this

(Testimony of Ross A. Himes.)

line (indicating). You can see the outline of the two boxes there; you can follow that. Those knives throughout [78] the length of this blank have been nicked in order to hold the two boxes securely together. They must not be separated until the folding and gluing operation is completed, until they are wrapped, put in packages, delivered to the customer and are ready for use.

Q. Then these nicks that you speak about in the cutting knives made it possible for two box blanks to hang together like this and be handled into a machine; is that right? A. That is right.

Q. Prior to that time, rather than having nicked knives we had smooth or straight knives, is that right, and we cut the cardboard through?

A. Not entirely, Mr. Smith. Nicks themselves are not new. Nicks have been used in box making practically ever since it started in order to hold a number of boxes on a multiple sheet. As I pointed out before, in box making practice it is customary to cut and crease as many boxes, nested as carefully as possible, on as big a sheet as you can on a cutting and creasing press in order to conserve time and material. Nicks have been employed sufficiently to hold the sheet together so it can come out of the cutting and creasing press onto the stripping table, where the bundles of boxes are taken apart.

Q. The nicks then are very old in box [79] making? A. Nicks and knives are old.

Q. That is right? A. Yes.

Q. With respect to arranging the box in a nested

(Testimony of Ross A. Himes.)

manner, I believe you testified it conserved paper, did you not? A. It does.

Q. And that is an old, common practice; is that right?

A. There again it would be old with other types of boxes, but it would be new as applied to folding bottom boxes. There is a distinction.

Q. Well, it certainly escapes me; would you care to explain? A. I beg your pardon?

Q. It escapes me; would you care to explain the distinction?

A. The nicks, that are employed in the nesting of these two cover sections in that manner, are both employed in this invention for the purpose of holding two boxes together during the process of folding and gluing so we can save 50 per cent of our machine time; whereas formerly the nicks were simply employed to hold a sheet of boxes together until they hit the end of the cutting and creasing press upon which they were separated then into single boxes. They were not kept in double boxes through the process of folding and gluing, and there is the distinction. [80]

Q. Is there any novelty as between this end wall—which, if you don't mind, I will mark "L" and this opposite one marked "M" on Exhibit "K-1," is there any novelty in having these tuck flaps that extend equally out and meet in the middle, in double blanking? A. No.

Q. Is there any novelty as between this wall "L-1" and this wall "M-1" in having a lid and a

(Testimony of Ross A. Himes.)

particular flap that extends from "L-1" to "M-1"?

A. No.

Q. And the same with respect to these upper walls which are merely duplications of the lower walls?

A. If you are speaking about the novelty insofar as cutting and creasing only is concerned——

Q. Double blanking?

A. Well, double blanking—through the process of cutting and creasing only, the answer is no, it is no novelty. It has been done for years.

Q. I am not talking about passing it through the whole machine; I am strictly talking about cutting and creasing.

A. There is no novelty.

Q. In that blank or any one that you use; is that right?

A. I cannot go along with you all of the way on that because there is a definite advantage and a purpose in [81] using that particular arrangement in folding bottom boxes which I have pointed out; to my knowledge, it has never been done in folding-bottom boxes, and there are claims in our patent which specifically cover that point.

Q. Irrespective of whether they are folding-bottom boxes or not, the top elements, the lid and the tuck flap, all operate the same?

A. If you ignore the bottom sections, that is old.

Q. This is Exhibit "C," a patent in your name you have testified, being the one here in suit?

A. That is right.

(Testimony of Ross A. Himes.)

Q. Have you ever read that patent proof from beginning to end? A. Yes, sir.

Q. Have you ever carefully studied the drawings? A. Carefully studied the drawings?

Q. Yes. A. Oh, yes, sir.

Q. Would you tell what figure 1 of the drawing shows?

A. Figure 1 of the drawing, ladies and gentlemen of the jury, shows a double blank similar to that of which we have been speaking.

Q. You are speaking of "K-1," I think, are you not?

A. Yes, similar to that, joined together with the nicks and the knives ready to be folded and glued in the double [82] manner.

Q. What does figure 2 show?

A. Figure 2 shows the same blank with a portion of the folding of the bottom sections having taken place.

Q. Could you demonstrate on this edge, for the benefit of the jury, what you mean by the folding of the bottom portions?

A. Yes. Figure 2 would show this same blank with the exception that the glue flaps—all four of the glue flaps have been folded under in this manner (indicating).

Q. And then figure 3 shows us what?

A. Figure 3 shows the bottom sections on both sides having been folded over onto the body of the box—and the same on the other side—and also shows by stippling the area where glue has been

(Testimony of Ross A. Himes.)

applied in preparation for the fold in the opposite direction.

Q. Which we all understand—one end in and the other end in?

A. These fold upon one another, that is true.

Q. Turning this back to its flat condition, that is what is shown on figure 1 as just a bare blank, perfectly flat? A. Yes.

Q. And in the next view this part had been folded under and the same over there, as such? [83]

A. That is true.

Q. And in the next one these parts had been turned over as such? A. That is right.

Q. Showing you then in figure 1, first condition, perfectly flat; figure 2, the flaps turned under; figure 3, the whole bottom elements being folded in toward the center of the blank?

A. That is what the figures show, yes.

Q. With respect to claim 1 of that patent which you are alleging the defendant infringes and we are claiming he can't infringe because it is not valid, you testified this morning and your attorney read to you from the claim? A. That is right.

Q. Had you read the claim, yourself, before he read it to you?

A. I have read those claims many times, Mr. Smith.

Q. You feel that you know exactly what they say? A. Exactly.

Q. Do you recall that the claim has an introductory clause or preamble that describes this double

(Testimony of Ross A. Himes.)

blank, all of that? A. Yes.

Q. And finally we get down to the words, “said method [84] comprising”; do you remember that?

A. Yes.

Q. From now on after those words we must be talking about the method of folding this box; is that right? A. That is what we are talking about.

Q. It reads in this manner: “Said method comprising folding said extensions on the lower faces”—what are the extensions? A. (Indicating.)

Q. That is right; they had glue on them originally in this particular box, did they not; they would be glue extensions or glue flaps?

A. Glue flaps.

Q. And it says here, “Said method folding said extensions on the lower faces of sections to which they are respectively joined”?

A. These sections, yes—on the lower faces.

Q. That is right; in other words, they are going to be laying flat as in this figure 2 that we talked about in the drawing a few moments ago?

A. Not necessarily; whether this face is pointed downward or upward, it is still the lower face of the box; it is the bottom of the box.

Q. A lower face means that it is a face that is exposed downward, isn't it? [85]

A. When you are speaking of a box, with a bottom, the lower face is the bottom of the box in my interpretation.

Q. It could also be the outer face of the bottom, couldn't it?

(Testimony of Ross A. Himes.)

A. Well, it would be more accurate to say the lower face of the box, I think.

Q. Of the bottom? A. Yes.

Q. Then this grey face that we see is apparently the upper face?

A. Not necessarily. That is the inside of the box.

Q. Well, when is it an upper face and when is it a lower face then; if it isn't necessarily an upper face it must be a lower face, must it not?

A. I would say that the upper face of this box is the upper face of the top of the box, if you are speaking about a box.

Q. We are not talking about a box. We are talking about a box blank, a double blank which is laying on the table or in a machine ready to be folded; it lays horizontal, does it not?

A. Yes.

Q. And passes through the folding machine horizontally, does it not? A. Yes. [86]

Q. And in that folding machine it has an upper face and a lower face?

A. The blank would have an upper face and lower face, yes.

Q. All right, will you tell us which would be the upper face and which would be the lower face?

A. When the blank is flat?

Q. Yes.

A. This would be the lower face of this particular section.

Q. Of the whole blank, which would be the lower

(Testimony of Ross A. Himes.)

face, in the folding machine?

A. The lower blank, here (indicating)—here.

Q. Everything that is pointing down on the table is the lower face? A. Yes.

Q. “Folding said extensions on the lower face of section, to which they are respectively joined.” Will you try to fold the blank to follow that?

A. (Folds blank.)

Q. Semi-colon following the word “joined”—what does a semi-colon mean, the end of a thought?

A. I couldn’t define that for you.

Q. “Folding the projecting portions flat upon the upper faces of their connected walls.”

A. Yes.

Q. That is as it appeared in figure 3 of the drawing, is [87] that not right?

A. I think so.

Q. We have already gone through two steps, then, haven’t we now? A. Yes.

Q. Following this statement here appears these words, “Thereby to upwardly expose the flat extensions.” A. They are upwardly exposed.

Q. In other words, this last folding over operation exposes those flat sections, for the first time, isn’t that right?

A. I wouldn’t go so far as to say that. We have made no sequence here. We are describing necessary operations to the folding without regard to the particular sequence in which they may come. I don’t believe that you could pin that method down to any particular sequence of folding operations as

(Testimony of Ross A. Himes.)

long as the manner in which it is folded and the result accomplished is the same. There might be mechanical differences between two machines that would do this folding operation. However, if the method—these folds are all made on both machines, and the final result is the same. Your language in claim 1 of the Himes patent still covers both of them. That is my opinion.

Q. Whether we do this and then this, or whether we do this [88] and that all at one time?

A. In the same manner we described a little while ago with someone making these by hand, it would be up to the discretion of the operator to determine how the mechanical means were arranged to accomplish the same purpose—not a different purpose; the same purpose.

Q. What is the purpose of the claims in a patent, if you know; will you tell the jury?

Mr. Mellin: If your Honor please, I believe the Court will instruct the jury on that point as a matter of law.

The Court: Overruled.

A. The purpose of the claims of a patent?

Q. (By Mr. Smith): Yes, sir.

A. Well, now, I am not a patent attorney so my language might not be accurate.

Q. We understand.

A. It is my understanding that the purpose of the claims of a patent are to describe what is new, an invention, and therefore patentable. Is that enough?

(Testimony of Ross A. Himes.)

Q. There is only one word. You said "to patent"—I stated "Define." It defines a patent, doesn't it?

A. Yes.

Q. Would you care to look at exhibit "C," your own patent and state how many claims are in that patent? [89]

A. Nine.

Q. That is, in effect, that patent covers nine inventions as defined in that claim, isn't that right?

A. I am not sure whether that is true or not. You describe your inventions in various ways in various claims of a patent.

Q. One claim, one invention, is that right—and maybe the next one would be changed slightly, so you have got a second claim, is that right?

A. I don't know.

Q. However, there are nine claims in that patent?

A. There are nine claims in the patent. [90]

* * *

Q. (By Mr. Smith): On page 4 of the defendant's exhibit "2," which is a copy of the patent, appears a phrase headed "Disclaimer." Would you care to read that to the jury?

A. Yes. It is headed "Disclaimer." "2243421, Ross A. Himes, Piedmont, California, paper boxes and method of making same. Patent dated May 27, 1941. Disclaimer filed October 24, 1941, by the assignee, NoloX Company of America. Hereby enters this disclaimer to claims 2 and 6 in said specification, official gazette, November 18, 1941."

Q. It was through some action of yours that that

(Testimony of Ross A. Himes.)

became of record in the patent office, is that right?

A. Yes. Through some action of my attorneys at that time.

Q. I beg your pardon?

A. I instructed my attorney to seek those disclaimers, under his advice. [91]

Q. Did you understand the effect of that act?

A. Yes.

Q. What was it?

A. The effect of that act was to disclaim the method described in making a single folding bottom box—not a double folding bottom box. Those claims disclaimed both referred to single blanks or single methods. We didn't feel that they were valid claims so we had them stricken out.

Q. You gave up the inventions that apparently were defined by those claims, is that right?

A. That is right.

Q. What caused you to believe they were invalid?

Mr. Mellin: If your Honor please, the same objection.

The Court: Sustained.

Q. (By Mr. Smith): In your reading of your own patent, when is the last time you read through that patent?

A. I have no idea, Mr. Smith.

Q. Yesterday? A. No.

Q. Last night? A. No.

Q. Today?

(Testimony of Ross A. Himes.)

A. No; probably sometime within the last [92] year.

Q. Have you read claim 3 of that patent recently?

Mr. Mellin: The same objection, your Honor.

The Court: The same ruling.

Mr. Smith: That is all.

Mr. Mellin: No further questions. [93]

* * *

NOBLE ANDRE

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Smith:

Q. Mr. Andre, will you please state your name and residence and occupation?

A. Noble Andre. My residence is San Francisco, and I have my own firm—the Andre Paper Box Company of San Francisco. Our offices are in San Francisco and our plant is in San Leandro, California.

Q. Can you give us in very round figures the gross volume of your business annually?

A. Well, our business exceeds one million dollars a year; it varies in excess of one million dollars.

Q. When did you start in business?

A. Well, this firm—the Andre Paper Box Com-

(Testimony of Noble Andre.)

pany, I started in 1936. However, I started in the industry, I believe, in 1932.

Q. Where did you start in business?

A. In Los Angeles. [102]

Q. In Los Angeles; in 1932?

A. No. I worked for my brother in 1932 for one year and then started a plant with another partner in 1933. I sold out to him in '34 and then came to San Francisco and worked two years for two different firms, and then started in business for myself.

Q. I wish you would tell the jury briefly the type of box you make?

A. We manufacture what we call folding paper boxes, boxes in some respects similar to the boxes we have been seeing this morning along with various other types of gift boxes, cake boxes and all of the boxes which are folded flat and in turn into boxes.

Q. Do you make automatic boxes?

A. Yes, we make several types of automatic boxes.

Q. Have you ever considered whether any of the boxes which you made you might not have a right to make?

A. Yes; very carefully. I mean we are constantly looking for new ideas and patents ourselves and are in constant touch with patent attorneys ourselves. We have three patents pending, ourselves; on different types of boxes.

(Testimony of Noble Andre.)

Q. Has this plaintiff taken any action with respect to your activities?

A. Do you mean—— [103]

Q. Mr. Himes?

A. Yes. There is a suit, I believe, filed against us at the present time for infringement on, I believe, the Parks patent.

Q. You are familiar with the Parks patent?

A. Yes, I am.

Q. Have you examined it and read it?

A. Yes; very carefully.

Q. Do you have any——

Mr. Smith: I might say for the convenience of the jurors and everyone involved we have had an enlargement made of the drawing of the Parks patent and it has been offered for identification as Exhibit "11."

The Court: Have you seen it, Mr. Mellin?

Mr. Mellin: Yes, I have seen it, your Honor. It is all right.

(Defendant's Exhibit "11" received in evidence.)

Q. (By Mr. Smith): What is there, in your opinion, in the Parks patent, the box structure according to that patent which may be unique?

A. I don't follow what you mean, there.

Q. All right.

Mr. Smith: Strike that question. [104]

Q. (By Mr. Smith): In your examination of the Parks patent, what type of box did you find

(Testimony of Noble Andre.)

would be made if a box were made according to it?

A. Well, it is an automatic sort of lock bottom.

Q. In other words, it discloses to you as a box maker an automatic lock bottom box?

A. That is the definition, I believe, which we use in the industry.

Q. Do you know of any other patents on lock-bottom boxes?

A. Yes. We have discovered several of them.

Q. Can you think of one in particular?

A. Well, there is one called Berkowitz that we discovered—Berkowitz or something.

Q. Is this a drawing of that box?

A. Berkowitz's, yes, this is it.

Q. What is taught there?

A. Well, this box here definitely shows it has the same principal of the locking feature; that is the part that we liked about that—is that it automatically locked.

Q. The same as what, Mr. Andre?

A. The Parks box—diagonally along the same lines.

Q. What you are testifying is that there is a similar element that you find in the Berkowitz patent as to something you find in the Parks patent, is that right?

A. That is right. [105]

Q. Can you give us the number or some identifying characteristic of the part in the Parks patent that you find in the Berkowitz patent?

A. Well, I believe they have a number here that

(Testimony of Noble Andre.)

says—is that “72” that points to that notch or is it this one?

Mr. Smith: I believe you will agree it is 72, won't you Mr. Mellin?

A. And this one here, I believe, is “22.”

Mr. Smith: Will you agree it is “72” that points to that notch?

Mr. Mellin: Oh, yes.

Q. (By Mr. Smith): Will you draw a numeral around the figure “72”?

A. (Witness draws.)

Q. And will you draw around something you find is similar in the Berkowitz drawing?

A. (Witness draws.)

Q. Are there any other elements in the Berkowitz that you find are similar in the Parks?

A. The fact that the inner walls here fold in, and when you press the sides of the box they will fold back.

Q. Is that something similar to something you see in Berkowitz—how the bottom elements fold in, as you explained?

A. Well, these drawings illustrate it. If you had a model [106] I could tell you a lot better by a model.

Q. Unfortunately, we don't have one at the moment. One similarity, now, that you are talking about is the inner and upper folding of the bottom elements between the sides?

A. That's right.

Q. In the flat condition?

A. Yes, sir.

Q. Is there any other thing in the Berkowitz

(Testimony of Noble Andre.)

patent which is similar to some thing in the Parks patent? Maybe I could simplify it for you, Mr. Andre. Would you tell the jury in your own language the similarities that you find—just point them out and call them by number as you go along?

A. Well, fundamentally all of the boxes from the top part are the same, with the locking features in the center the way these are shown—the bottom portions fold up and attach to the outside walls in both cases, however, in slightly a different manner. But the primary purpose or the accomplishment is the same. In my own office we have made up samples of these boxes along with two other types of boxes. The end result is exactly the same, in other words, it comes out the same way. We particularly liked the Berkowitz patents for the reason that this center locking— [107] when the box was opened that it created a lock and held it rigid.

Q. Berkowitz's does that, is that right?

A. Yes. So we have been using on one type of box, recently, certain features of that box, ourselves.

Q. You feel you have the right to do that?

A. Well, yes. I have noticed here it was filed in 1925 and it has long been expired.

Q. Just so there won't be any confusion about it—the filing date doesn't have anything to do with the expiration date.

A. I see another date there. I see it is February 5, 1929—I guess it is 17 years after that.

Q. 17 years after 1929 would be when?

(Testimony of Noble Andre.)

A. 1946. That would be expired.

Q. That means that that has expired. I think that is a proper conclusion.

The Parks patent and boxes built according to it, such as Plaintiff's Exhibit "G" laid there before you, is that identical with the blank, Defendant's Exhibit "1," in your estimation?

A. No. It is a variation of it. It isn't identical.

Q. How does it vary?

A. I see that the diagonals are on different panels, and the notching of the center arrangement is something we [108] have noticed that is a variation. This particular one follows along the line of the Parks—not the Parks, but that other patent there. It has the curved effect which allows it, when the box is engaged, a little easier than does Parks with the notch in it.

Q. You think that the round end as in 24 Berkowitz is that way? A. Yes.

Q. Would you hold that Exhibit "1" on top up so that the jury can see, the point clearly to what you mean by that?

A. Well, that this locking which is in the center of the box when they are closed—around there it works a little better than this notched effect.

Q. And you feel that that is borrowed from the teaching of this Berkowitz patent?

A. Well, I can see it right there, yes.

Q. Would you draw an arrow pointing to one of those ends on that Berkowitz patent which gives you that idea?

(Testimony of Noble Andre.)

A. The center feature; that is the one that is marked "22." And over in this section it is marked as "21-B."

Q. That is where you have drawn the circles around the box, there? A. Yes.

Mr. Smith: No further questions. [108-A]

Cross-Examination

By Mr. Mellin:

Q. Mr. Andre, if I tell you this fact—that this Berkowitz patent was before the Patent Office and was referred to in the Patent Office during the prosecution of this Parks patent, and the Parks patent was issued in spite of the fact that Berkowitz had already been in the office and considered by the Patent Office, would that change your opinion as to whether or not they are substantially identical?

A. I can't—they certainly look identical to me. I don't understand the legal phases of it.

Q. You started making automatic boxes within the last year, haven't you, of the type that you are being sued upon in San Francisco?

A. No, I would say——

Q. Sometime during '50?

A. No. First we had—I believe it was in 1947—we had an application and letters patent for an automatic box that has no glue at all—in other words, the side seams are not glued at all—which has a locking feature, also, but I mean it is not glued.

(Testimony of Noble Andre.)

Q. I think I can save you time. I mean of the type which you are making which you are alleged to have infringed [109] the Parks patent with?

A. I would say about two years ago.

Q. The suit was brought in October of last year; does that help you out?

A. October of last year?

Q. Yes.

A. I would say it might have been two years prior to that—between one and two years.

Q. In those boxes you didn't cut the box blanks as shown in the Berkowitz patent did you?

A. Certain features of it—no, not the box in its entirety.

Q. Or the bottom flaps weren't cut as shown in Berkowitz were they?

A. I don't follow you.

Q. These flaps that form the bottom weren't blanked out as shown in the Berkowitz?

A. One order we did. We have tried every version. We have been trying everything. I have got some inventors down there that do everything.

Q. And one reason that you are doing that is because you are trying to find a box that doesn't come within the Parks patent?

A. The whole issue seems to be so confused—just to find another one if we can. [110]

Q. I see. In the boxes that you made, you didn't run the boundary line of this lug out here to the corner so that the two didn't overlap at the corner, did you?

(Testimony of Noble Andre.)

A. Frankly, I couldn't testify exactly as to how. All I know is that on these center parts—the only way we could have made it and the only way they will engage is that that was the main feature. What they would do is similar like these two; they put the diagonals here and the diagonals there. It is really so confusing—I just sit there—I have two fellows in our office that handle this. They go to the attorneys and I sit there and then excuse myself. I am not an expert at reading the drawings. If we had a model I could show you.

Q. The model that I hand you here is more like the one that you are being sued upon, isn't it?

A. Well, now, to me it is similar right in that instance. Our glue flaps are on the other end but——

Q. In other words, from an actual blanking out it is closer to the box I have handed you than to the Berkowitz patent, isn't it?

A. The one on which you are bringing suit? Oh, yes, definitely.

Mr. Mellin: May I have this marked next in order? [111]

(Carton marked in evidence as Plaintiffs' Exhibit "N" for identification.)

Q. (By Mr. Mellin): Are you contributing financially to this suit we are in—in any way at all?

A. I merely came for my own information to find out.

Q. Didn't your attorneys take Mr. Himes' deposition in San Francisco at your expense?

(Testimony of Noble Andre.)

A. Not to my knowledge.

Q. You knew his deposition was being taken there by your attorneys?

A. I believe they have already taken it.

Q. You knew they were taking it?

A. Yes.

Q. Do you expect to pay for that or not?

A. I was talking to Mr. Chadwick. I think now that I see the situation that we weren't definitely committed to pay for it. But I feel in my own mind we are getting a lot of benefit out of this and now we are going to pay for it.

Q. In other words, this suit might determine your suit in San Francisco?

A. Very definitely. They told me that it had a lot of bearing there and I told them I would stand that. [112]

Q. As I understand your testimony you said that in the office or in your plant you had made a couple of samples of this Berkowitz box following it?

A. Identically following it, yes.

Mr. Mellin: That is all.

Mr. Smith: That is all, Mr. Andre, thank you.

(Witness excused.)

Mr. Mellin: I offered that box in evidence to illustrate the witness' testimony.

The Court: Exhibit "N"?

Mr. Mellin: "N" like in Nellie.

(Carton, Plaintiffs' Exhibit "N" received in evidence.)

Mr. Smith: The defendant would like to introduce Exhibit "1" in evidence. There seems to be a confusion your Honor. The clerk believed that Exhibit "2" was rejected. I believe that Mr. Mellin did not object to Exhibit "2." The witness read from it. It was a copy of his own patent.

Mr. Mellin: I have no objection.

Mr. Smith: I would like to offer it in [113] evidence.

(Defendant's Exhibit "2" received in evidence.)

Mr. Smith: Exhibit "3" is a Nalley's box. It is also known as Exhibit "3" in the Himes deposition and was marked by the plaintiffs in answering certain of the defendant's interrogatories. This particular model is already part of the deposition. We are offering it also as Exhibit "3" in this case. A copy of the Berkowitz patent number 1700733 is offered as Defendant's Exhibit "4." A photostatic copy of a British patent issued to a man named Filmer is offered as Defendant's "5." I believe you have no objection?

Mr. Mellin: No objection.

Mr. Smith: A French patent to a man named LeBlanc is offered as Defendant's Exhibit "6." A copy of an American, a United States Patent to a man named Cramer is offered as Exhibit "7." A soft copy of a Neumann patent is offered as Exhibit "8." The Morris patent as Exhibit "9," and of the Rutledge patent as exhibit "10."

And the enlarged views of the drawings of the

Parks and Berkowitz patents are offered as Exhibits "11" and "12"; Parks is "11" and Berkowitz "12," your Honor. [114]

(Defendant's Exhibits "3," "4," "5," "6," "7," "8," "9," "10," "11" and "12" received in evidence.)

Mr. Smith: I would like to call Carl Thom.

CARL W. THOM

called as a witness by and on behalf of the defendant, having been first duly sworn, was questioned and testified as follows:

Direct Examination

By Mr. Smith:

Q. Will you state your full name and spell the last name? A. Carl W. Thom, T-h-o-m.

Q. Where do you live, Mr. Thom?

A. Seattle.

Q. How old are you?

A. 54—I will be 55.

Q. What is the nature of your work?

A. Well, I am a sample maker in a cylinder cutting press.

Q. In what kind of a——

A. In a folding box plant.

Q. For whom do you work?

A. For Mr. Chadwick.

Q. The defendant in this case? [115]

A. Yes.

(Testimony of Carl W. Thom.)

Q. How long have you worked in the folding box business?

A. I started in 1916 and I was out about four years. That makes about 31 years.

Q. That is a long time. A. It sure is.

Q. Where have you worked in the folding box business?

A. In Los Angeles, San Francisco, Oakland, Tacoma, Seattle.

Q. All up and down the Pacific Coast?

A. Yes.

Q. You said that you were a sample maker; can you explain for the benefit of these people what a sample maker is?

A. If a customer wants a certain box I make the sample for him to put his product in. He usually has a style that he wants and I make the sample so that we can have the die made from that sample if it is okay with the customer.

Q. Do you originate the sample just out of your mind?

A. Not always. In some cases I have had to; in some cases there are little changes to be made in certain types of boxes that we make them fit the kind of product that goes in them.

Q. With respect to the features that you build into a box where do you get the information as to how a sample is [116] to be made?

A. How is that now?

(Question read by the Reporter.)

A. That usually comes from experience. It all

(Testimony of Carl W. Thom.)

depends on the article that goes into the box, the type of box that the customer wants. They are all designated by certain names—the boxes are. It all depends on the customer's wants, too.

Q. How do you learn what the customer's wants are?
A. I beg your pardon?

Q. How do you learn what the customer wants?

A. He usually has his own idea. As a general rule they have their own idea of the type of box they want.

Q. How does he get that idea to you?

A. He tells the salesman and the salesman tells me.

Q. Do you sometimes talk to the customer, too?

A. Sometimes, yes.

Q. And sometimes it comes through the salesman?
A. That is right.

Q. By word of mouth or what other means?

A. No; they usually have requisitions. They have written down requisitions, and the information is given to me on a requisition.

Q. Are drawings ever furnished you?

A. Sometimes sketches, but I can hardly read them. [117]

Q. You testified that you were a cylinder press man, I believe?

A. Yes; cylinder cutting press man.

Q. Cylinder cutting press man?

A. Also a platen cutting press man, too.

Q. Is that a recognized trade?
A. Yes.

(Testimony of Carl W. Thom.)

Q. Does it have various grades of apprentices and journeymen? A. Yes.

Q. Which are you?

A. 31 years, I ought to be a journeyman by now.

Q. Do you recall off hand when you first became a journeyman?

A. No, I don't. I imagine, though, it was probably two or three years after I started.

Q. Two or three years after 1916?

A. That is right.

Q. I see. Are there any other operations around a box folding plant that you may perform?

A. Anything in the general work in a folding box plant I can usually get away with. Printing is out of my line.

Q. Do you run a shear? A. Yes. [118]

Q. Do you run any other machinery?

A. Folding gluers and waxing machine.

Q. What kind of folding gluers are you familiar with?

A. What they call straight line; it is an automatic straight line gluer.

Q. Does it have a particular name that it is designated in the trade?

A. Yes, Staude, International; there are several different types but those are the two that I am familiar with.

Q. Have you ever seen drawings such as appear in Defendant's Exhibits "11" and "12," Mr. Thom? A. Yes.

(Testimony of Carl W. Thom.)

Q. Do you understand that those are patent drawings? A. That is right.

Q. Have you read the patents?

A. Do you mean the explanation of them?

Q. Yes, sir.

A. Not completely, no.

Q. You have studied the drawings?

A. Studied the drawings, yes.

Q. Have you ever done anything with respect to what you learn in those drawings?

A. I have made samples of them.

(Carton marked as Defendant's Exhibit
"13" for identification.) [119]

Q. I hand you Defendant's Exhibit "13" and ask you to tell me what it is; in handling it I would prefer that you probably not expand it any farther than you have at the moment. What is Exhibit "13"? A. That is Berkowitz's patent.

Q. What do you mean?

A. A Berkowitz patented model.

Q. It is a model? A. Yes.

Q. Do you know whether or not you made that?

A. Yes, this looks like my work. It definitely is.

Q. Is there some particular characteristic that tells you it is your work?

A. Yes; there it a little dirt on it, there.

Q. Did you exercise any degree of care in making that model?

A. Yes, I did. I tried to get them as near as possible. A sand sample is pretty hard to get from

(Testimony of Carl W. Thom.)

a blueprint accurately; that is, right on the spot. I tried to get this as perfect as possible, by hand.

Q. If Mr. Himes had testified that he had difficulty with his, you could have understood what he meant, is that right? A. Yes.

Q. I hand you plaintiffs' Exhibit "E" and ask if that has [120] any similarity to anything you have ever seen?

A. Yes. That is the Parks patent.

Q. Would you hold it up with the bottom to the jury and show them how it operates?

A. Do you want me to snap it; you don't want me to close it?

Q. Yes, you may.

A. (Witness demonstrates.)

Q. Will you show with the model which is sitting before you?

A. (Defendant's Exhibit "13"—witness holding it up for the jury to see.)

Mr. Mellin: Is that in evidence?

Mr. Smith: We will offer it in evidence, your Honor.

Mr. Mellin: If your Honor please, may I reserve the motion to strike until after the jury has received this testimony?

The Court: You may reserve the right. Proceed.

Q. (By Mr. Smith): Will you hold up the Parks box as you did and close the bottom, please?

A. (Witness demonstrates.)

(Testimony of Carl W. Thom.)

(Exhibit "13" of defendant received in evidence.) [121]

Q. (By Mr. Smith): Will you show the jury the interior of Plaintiff's Exhibit "E"; will you put them alongside so if there are any similarities they will be apparent?

A. (Witness demonstrates.)

Q. As a box maker, Mr. Thom, can you see any real differences between the structure of Exhibit "E" and Defendant's Exhibit "13"?

A. There is very little difference. They are very similar. They both answer the same purpose. As a matter of fact, there is very little difference in the two boxes.

Q. Well, let's point out the similarities that you see. Just start out and name anything that you see, anything that comes to your mind?

A. Well, they both have the overlapping flap with the inter-locking device and although they are a little different shape they are exactly the same in that respect—the overlapping tab over the top.

Q. You have mentioned differences in shape; what are those differences?

A. This particular one has round knobs in it and this one here has more square shape.

Q. Except for those differences you see similarity, is that correct?

A. Very much. They are similar.

Q. I notice that Exhibit "E" is a box that is longer than [122] it is wide, whereas Defendant's

(Testimony of Carl W. Thom.)

Exhibit "13" appears to be square, is that correct or is it not? A. That is right.

Q. Do you think it makes any difference whether these features incorporated in these two boxes are square or rectangular boxes?

A. I shouldn't think it would, although I didn't make any of this type—Berkowitz—this shape.

Q. Rectangular?

A. No, I didn't make a rectangular box after the Berkowitz style but I presume it could be done.

Q. You would fear to tackle the job would you?

A. No, I wouldn't be afraid of it but then I never tried it so I couldn't say that it would work.

Q. You have testified that the structure was similar; what can you say about operation?

A. Well, the operation is similar. As a matter of fact, the operation is identical because they both have to close with the same kind of an operation. They both are pushed from opposite corners to lock, and when they go down they snap into place identically, and they answer the same purpose—they can't be pushed up or they can't be pushed down.

Q. I didn't notice; did you put your hand in either of those boxes to snap the bottoms [123] down? A. No. No, it just went in itself.

Q. Would you call both of those automatic lock-bottom boxes? A. That is right.

Mr. Smith: No further questions.

(Testimony of Carl W. Thom.)

Cross-Examination

By Mr. Mellin:

Q. How closely in this model of Berkowitz did you follow the drawings?

A. Well, I don't know; in that particular box there I think that was to scale of their patent, their design.

Q. Did you use any of your experience that you gained in observing other automatic boxes in making it—you could hardly divorce that from your experience in making other automatic boxes, could you?

A. I went according to their drawing; that is all I did with this box of theirs. I didn't incorporate any of my own ideas or anything in the box.

Q. I notice that the tabs, in passing by each other, in Berkowitz, had to partly break the knobs, as you call them, before you got them by. You observe that in the box, don't you? A. Yes.

Q. In other words, you had to use a little more pressure to [124] —it didn't slide by and then snap in without first breaking?

A. No, not as easy as some of them.

Q. As a matter of fact, and I want you to give this very careful consideration—I want to show you a large drawing of Berkowitz——

Mr. Mellin: You will agree that this is an enlargement, won't you?

Mr. Smith: Yes.

Q. (By Mr. Mellin): Now, I draw a line

(Testimony of Carl W. Thom.)

through that tab and I find that the end of the knob in Berkowitz is a perfect half circle, isn't that correct? A. That is right.

Q. Now, you didn't do that in your box, did you—you made a cam action out of it, didn't you?

A. Not intentionally, no.

Q. Well, I will ask you to examine it; could you take it apart so that we could show the jury that what you actually done was to use the knowledge of the prior art in making a cam action out of it so that it would be possible to close that box automatically; observe it—are they half circles in your box?

A. Well, I would say they are. They are practically round if they would be put together.

Q. You notice your center line, don't you; aren't they as [125] a matter of fact a distorted part of a circle like a cam?

A. It could be; it could be—but it wasn't intentionally, I will tell you that.

Mr. Mellin: What I am talking about, your Honor, is that these are distorted cams rather than half circles, and I call that to the attention of the jury.

Q. (By Mr. Mellin): As a matter of fact, you did that in order to make the box automatic, didn't you? A. No, not necessarily.

Q. You didn't do it on purpose?

A. My intentions were to have it round.

Mr. Mellin: May I offer this enlargement which was just used to explain the witness' testimony?

(Testimony of Carl W. Thom.)

(Enlargement marked in evidence as Plaintiffs' Exhibit "O" for identification.)

(Exhibit "O" received in evidence.)

Q. (By Mr. Mellin): In the Berkowitz box, when it is folded, actually in the corners where the two pieces come together, there isn't any overlaps at all, is there?

A. No, there isn't on that. [126]

Q. And that is the way your model is, too, isn't it? A. Yes.

Q. So that if you had a heavy object in the box it could lower one edge from the other and would be visible from below or could leak out, wouldn't it? A. Not if it overlapped.

Q. You just testified that they don't overlap?

A. They do overlap; that is what I meant.

Q. Can you cut these to the corners and still get an overlap in that drawing?

A. I don't know just what you mean.

Q. I don't mean to confuse you, Mr. Thom; may I point it out in the model. Actually, if these are cut truly from the corners, there is no overlap in the corners, is there?

A. Not right in the corner, no.

Q. And for a considerable distance there is very little? A. That is right.

Q. So that if you put a heavy object in that only rested on one side it could open that at the corner to some degree?

A. Yes, a small degree.

(Testimony of Carl W. Thom.)

Q. Have you ever seen those Berkowitz boxes used commercially? A. No, I never have.

Q. I notice you made this one out of relatively light [127] material. Are they both about the same stock or is this heavier?

A. They are a different type of board.

Q. This is a soft board, isn't it? A. Yes.

Q. And that soft board would lend itself more to those tabs bending to get by the lock, rather than braking? A. That is right.

Mr. Mellin: That is all.

Redirect Examination

By Mr. Smith:

Q. When Mr. Mellin drew that pencil line that appears on Plaintiffs' Exhibit "O," I believe your testimony was that it produced a half circle, is that right?

A. Did I testify to that, do you mean?

Q. I believe that was your testimony, was it not?

A. Yes, that was my intention to make it that way. If it wasn't, it was just an error.

Q. Would you step over and examine the rest of the drawing, of which this is but a part, and with this ruler that Mr. Mellin has furnished and with this pencil——

Mr. Mellin: We agree, don't we, Mr. Smith, that what I produced is but a still larger view of that [128] drawing?

Mr. Smith: I merely want him to see——

Q. (By Mr. Smith): Draw a figure to the left

(Testimony of Carl W. Thom.)

of Berkowitz's exhibit in figure 12 which follows that dotted line out.

A. (Witness draws line.)

Q. And draw a line similar to the one that appears on Defendant's Exhibit "O" on the bottom half attached to the right in Berkowitz's.

A. To the right?

Q. Yes, sir.

A. (Witness draws line on exhibit.)

Q. What would you say those curves above the pencil line you have just drawn are; are they portions of two circles?

A. No, I wouldn't say they are. They don't look quite like they would be a perfect circle.

Q. Do you mean they——

A. They would be a little oblong.

Q. Unbalanced circles—compound curves, I mean?

A. Yes.

Q. If you will just hold up Defendant's Exhibit "13," the box that you have been testifying to. Do you see any difference in the end of the lugs in that Exhibit "13" and the end of the lugs in the drawing of Exhibit "12" [129] or of Plaintiffs' Exhibit "O"?

A. No, there is no difference.

Q. The same curvature?

A. They are practically the same. I would say they are the same.

Q. Now, that Exhibit "13" that you have in your hand, is it or is it not based on what you learn from the drawing such as Exhibit "12" over here?

A. It is.

(Testimony of Carl W. Thom.)

Q. Did you require any outside information or teachings in order to make that model?

A. No; except following the blueprint.

Q. Plus the fact that that is your work, is it not?

A. That is right.

Recross-Examination

By Mr. Mellin:

Q. Do you work for the defendant Chadwick?

A. That is right.

Mr. Mellin: That is all. [130]

* * *

MEADE A. HYNDMAN

called as a witness at the instance and on behalf of the defendant, having been first duly sworn, was questioned and testified as follows:

Direct Examination

By Mr. Smith:

Q. Mr. Hyndman, will you state your name, please?

A. Meade Hyndman.

Q. Where is your residence?

A. Los Angeles, California.

Q. What is your business?

A. Right now?

Q. Yes, sir.

A. I am manager of the branch factory of Standard Paper Box Corporation. [131]

Q. Where? A. In Longview, Washington.

(Testimony of Meade A. Hyndman.)

Q. And the work of that organization is what?

A. Manufacturing folding paper boxes and carriers.

Q. You say a branch factory? A. Yes.

Q. Is there a main factory?

A. Los Angeles.

Q. How long have you worked at that business?

A. In my present job?

Q. Yes, sir. A. Oh, a year and a half.

Q. What did you do before that?

A. Well, I was in the folding box business off and on for many years.

Q. As an employee of a company?

A. Yes.

Q. What company, please?

A. Numerous ones; do you want me to enumerate them all?

Q. Could you mention one or two?

A. There was Acme Folding Box Company, St. Louis, Inter-State Folding Box Company in Middleton, Ohio; Gebhart Folding Box Company, Dayton, Ohio; Richardson Taylor Printing Company, Cincinnati, Ohio.

Q. Over what period of years did this type of work extend? [132]

A. Since I got out of World War I—I got out in September, 1919, and I was working in 1920 in the folding box industry. I had been in the paper industry prior to that.

Q. Have you ever engaged in business for yourself? A. Oh, yes.

(Testimony of Meade A. Hyndman.)

Q. What type of business was that?

A. Oh, manufacturing chemicals. I have been in the insurance business—my own business.

Q. Have you ever been in the paper box business as an operator or in your own right?

A. Not fully.

Q. Not fully.

A. No. I have had interests in folding paper box factories but not complete owner.

Q. Have you ever made any inventions in the folding paper box business?

A. Yes, sir; quite a few.

Q. Have you received patents upon them?

A. Yes, sir.

Q. Can you say how many?

A. Oh, half a dozen—possibly more, in the folding box industry. I have patents in other industries.

Q. Yes. And the patents that you received in the folding box industry, did they relate to any particular kind of [133] folding boxes?

A. Yes. They related to lock bottom boxes such as the Himes box; they related to what I call snap corner boxes similar to the Nolo box; they related to a box similar to the "Beers" patent style with the exception that it had patentable features over Beers patent such as a double corner of boxboard at all corners.

Q. Do you feel you have any special information with respect to the folding box business?

A. Special information?

Q. Yes.

(Testimony of Meade A. Hyndman.)

A. I have been in it a long time; I have had some special experience in it.

Q. What experiences—would you just recount them in your own words, please?

A. Well, I have worked as a common laborer in a factory from sweeping the floors to baling, to tying bundles as we formerly did a number of years ago before we packed cartons in shipping cases. I have worked on every piece of machinery in a folding box plant and most of them on the set-up in a corrugated and fiber box patent. I have made a number of changes in standard equipment in those plants that have—oh, proven beneficial or made them more efficient.

I have sold; I have managed a plant. I have done [134] about everything in a folding paper box plant.

Q. Reverting back to your patents on folding boxes, did you ever use those patents in any commercial way? A. Commercial?

Q. Yes.

A. Oh, yes. I went out and licensed people to manufacture under my patents.

Q. When was that?

A. The last three and a half years.

Q. Are you doing that now? A. No.

Q. Why not?

A. Well, in the first place, I found out that Himes claims I was infringing, and that forced me into really going to town and making searches to find out if I was, because under no circumstances

(Testimony of Meade A. Hyndman.)

did I want to infringe on any one, much less Ross Himes because Ross was the first one to commercially get up boxes of the lock bottom construction and the snap corner construction, and he did an excellent job—a lot of hard work, a lot of time, a lot of effort and a lot of money. I didn't want to infringe on him. I wasn't anxious to infringe on anyone. That wasn't my object. I thought I had something new—something entitled to the word "invention." The first thing that called it to my [135] mind was Ross's threat of suit. And then one of my prospective licensees who at the time was dealing with Ross on his licensing his patent and he wanted me to make a comparison between my patents and Himes' patents and I said one was about as good as another. He said, "Well, they are going to stop you from licensing people because they have bought—" —by they I mean Himes or Nolo Corporation—"have bought a Parks patent. Are you familiar with that?"

Q. Yes, sir?

A. They asked me that. "I have seen it, but that applies to a totally different kind of box than the one Himes and I are making now." So they pulled out a Parks patent copy and showed it to me. And I said, "Yes; that is on a tuck-in carton." The drawing was a small oblong or a small rectangular thing, and it looked to me like it was on a box as you pack flour in. Just at that minute it struck me, "Why, you stupid thing, you can make that any size, irrespective of the drawings." So I

(Testimony of Meade A. Hyndman.)

got a copy of that patent and read it over. And I said, "By golly, if Himes is going to buy that patent or has bought that patent to strengthen his own patents"—which was a logical idea—"he has really got something and I had better look into this more thoroughly." So I had a search made— [136] in fact, two searches made. And then I wrote to a number of people whom I thought were quite familiar with the different box constructions in the industry and who were friendly to me—both manufacturers and patent attorneys—and they sent me some patents that they thought applied to the Himes and the Hyndman; and when I got to studying these things I saw where I was wrong.

Q. Studying what things, Mr. Hyndman?

A. These patents—these older patents. Oh, golly, there was a bunch of them.

Q. Can you remember the names of any of them?

A. Well, I remember three outstanding ones.

Q. What are they?

A. Well, one was the one you were talking about here yesterday—this Berkowitz. The moment I saw that thing I said, "I am on the wrong boat, here."

Q. I hand you Defendant's Exhibit "4"; is that the one you are speaking about?

A. Yes, that is it. You see, that is back in '29 it was granted. I had a patent application in for something that was almost identical to this, but better, to me.

Q. You mentioned that you could remember the names of three and you mentioned Berkowitz?

(Testimony of Meade A. Hyndman.)

A. I am just going to state the outstanding ones, if you want me to. I have in my record here many others. But [137] there was a fellow in Great Britain by the name of Filmer. Oh, his went back considerably. Then one of the folding box gluing manufacturers—there are only two of them in the United States—he sent me one that was a French patent.

Q. Does the name come to you?

A. No; but I can give it to you from my records. My records are here in my bag.

Q. I hand you Defendant's Exhibit "5" and ask if that is a copy of any of the patents that you may have been testifying about?

A. This is the Filmer patent. There are two of these. One is not applicable to the lock-bottom box. That one was taken out in the United States; and this one of Filmer's was taken out in Great Britain. The British patent of Filmer is the one I refer to.

Q. Does it have a date upon it?

A. Completely accepted April 30, 1931.

Q. I hand you Defendant's Exhibit "6" and ask you if you can identify that?

A. Yes; that is the French patent.

Q. What is the name that appears upon it?

A. "M. LeBlanc."

Q. Does that have a date upon it?

A. This goes back to 1911. [138]

Q. After you had examined those three patents and possibly others, did you arrive at any conclusion with respect to this Parks patent?

(Testimony of Meade A. Hyndman.)

A. Well, I arrived at the conclusion that both the Parks and the Himes and the Hyndman had been anticipated in the art of the industry. This Berkowitz is the one that knocked me from under my hat because that is '29, and this British is '31. This 1911 French patent of LeBlanc, of course, shows the idea of two—each of the four bottom panels of a box adhered together so as to make what I called a double fish-mouth on the bottom of the box when the panels are folded inwardly.

Q. What was that word you used—double—

A. Double fish-mouth. That doesn't make good sense, but it makes sense to me.

Q. You are attempting to describe a shape or something by those words; is that right?

A. Yes—a double fish-mouth—they interlock (indicating with hands). Oh, these children's story-books are full of them.

Q. Self-erecting articles, is that what you are talking about? A. Yes.

Q. After you had studied the Berkowitz patent what was your conclusion with respect to Mr. Himes, or at least [139] this prospective licensee's views about the Parks patent?

A. Don't go too fast for me. What was that question, sir?

Q. Well, I will strike the question. Following your study of the Berkowitz patent, did you arrive at any conclusion with respect to the Parks patent?

(Testimony of Meade A. Hyndman.)

A. Yes. I thought the Berkowitz patent had everything that the Parks patent had in it—everything, everything.

Q. If that were the case, would you have felt immune with respect to the Parks patent?

A. Would I?

Q. Yes. A. Yes.

Q. Did you feel immune? A. Yes.

Q. Immune from what?

A. Immune from the Parks patent, but not immune from this prior art. Of course, the prior art had run out and the Parks hadn't.

Q. When the patent runs out, what is the effect?

A. Well, anyone can make it.

Q. Did you feel that you could make what Berkowitz showed? A. Yes.

Q. Did you? A. Did I make it? [140]

Q. Yes, sir. A. No.

Q. Why not?

A. Well, in the first place I didn't want to get tangled up in any lawsuit; in the second place I didn't want to harm any of my licensees at the time. So when Himes not only threatened to sue me but gave me notice of suit I cancelled out on all of my licensees. God, there was too many of them. I mean they threatened me from all around and I didn't have the money to fight these cases, so I just backed out as graciously as I could—just backed out, period.

Q. You used the words "cancelled out the licensees," I believe. What effect did that have upon your income, if any?

(Testimony of Meade A. Hyndman.)

A. Well, I just had none. I didn't have any.

Q. If you had felt that you had a defensible position, and had defended that position, what would have been the result, in your estimation?

A. Oh, I thought that I could beat the case as far as the Himes patents and the Parks patents were concerned by bringing out in the art what existed prior to the Himes, the Parks and the Hyndman. But what good would it have done me?

Q. Would it have done you any good? [141]

A. Well, there might have been a little personal satisfaction. You can't buy groceries on personal satisfaction, sir.

Q. After Mr. Himes gave you notice of suit, then what happened?

A. Nothing. I just didn't defend it.

Q. And the result was what?

A. They won by default.

Q. And then what happened?

A. Well, they were going to sue me for their judgment. I don't know—it didn't make much difference to me—twenty-five thousand dollars three times; I think that was the amount stated, and attorney's costs and this, that and the other thing. They were going to sue me for that amount—well, I had only one thing that I could do. I could go through bankruptcy. Yo can't get blood out of a stone. So then they said they would take my patents—the patents I had used for licensing. "All right; give you satisfaction in full for all judgment rendered—that is all right." The patent is no good

(Testimony of Meade A. Hyndman.)

to me. I am not going out and licensing on them—not with what I know.

Q. So you satisfied your judgment by assigning your patents to them, did you? [142]

A. Oh, yes—got full satisfaction.

Q. By “them,” who do you mean?

A. NoloX Corporation of America, which is Ross and his father.

Q. What particular things did you find in the Berkowitz patent that gave you a feeling of immunity with respect to the Parks patent?

A. Well, let’s start off this way: On all of these lock-bottom boxes there are four bottom panels today. They are all more or less alike. I have got one trick in mine, and you have got one trick in yours, and so forth. Two of the bottom panels—they adhere together; the other two, they adhere together. Then when these are pushed up inside of the box and the box is glued together with a glue flap——

Q. Just a moment, Mr. Hyndman. This is Defendant’s Exhibit “1.” Can you tell us what you mean by——

A. Well, here’s your four bottom panels (indicating). Now, two of them—these two are adhered together (indicating).

Q. Can you show us what you mean by that?

A. When I said adhered together, this is stuck to this when this goes over. All right. You have got the same thing—exactly the same thing over here (indicating). Now, when your boxes—when

(Testimony of Meade A. Hyndman.)

they are folded [143] over this way, then this glue seam is adhered together and you have got a box. When you push them, the darned squares squares up on the bottom.

Today, since people have got lock-bottom conscious—and Ross was the first one in the United States that ever made anyone lock-bottom conscious, including me—they always go into the four bottom panels with two of them adhering together. Now prior to that, they had other methods of making lock-bottom boxes that didn't require four bottom panels. Say these are cut off—they had two of them. But these darn things were folded in such a way that they would come over here and be glued and they created that bellows—that gusset—that fish-mouth. And Berkowitz is one of them. They all function alike.

All right. Pardon me for digressing. I could see in the Berkowitz everything that was in the Parks. I could see these panels with the exception that instead of four of them—as later date inventors have used—it had two of them, but was utilizing them in the same way as four. I saw the interlocking lugs that when you set the darn box up once it locks and you couldn't knock it down without unlocking the interlocking lugs.

Q. You just testified that instead of using four bottom panels they used two that operated in the same way? [144]

A. Yes.

Q. Can you show us on this enlarged Berkowitz drawing what you are talking about?

(Testimony of Meade A. Hyndman.)

A. Yes (witness approaches easel and diagrams of Berkowitz and Parks patents).

Q. Can you stand so the jury can see what you are talking about?

A. Irrespective of the size of or shape of the box we have four bottom panels. Especially since this Parks patent was issued and, oh, within the last ten years everybody all over the country—a lot of them got the idea of making a lock-bottom box. They all used four bottom panels. Now in this Berkowitz they have not used four bottom panels, but just two; but they have been folded in such a way that they cover—this one will cover this panel and this one will cover this panel (indicating). You get the cover arrangement for these two blank panels and it functions exactly the same as the four bottom panels. You can get that gusset in a dozen ways. Himes has four or five of them; I have two of them. I know of many others.

Q. You mentioned interlocking. Can you show what you meant by that?

A. An interlocking lug is something that when you take this flat box after it is all glued together and you give it [145] a push to erect it or set it up, an interlocking lug is something that is in there that keeps that box from collapsing of its own accord.

Q. Is there such a lug in the Berkowitz drawing?

A. Yes, you have got one here. This acts as your overlap, and here is your interlocking lug.

Q. Is there just one?

(Testimony of Meade A. Hyndman.)

A. No; there is never one.

Q. Why not?

A. Well, they have got to interlock—something has to interlock with the other.

Q. Can you say offhand, Mr. Hyndman, how many folding box manufacturers are there in the United States?

A. Oh, I would make a guess—close; four hundred and seventy-three, large and small. I am not off twenty.

Q. Do all of those people make lock-bottom boxes? A. Oh, no.

Q. How many of them would you say do?

A. Well, I wouldn't know that; but there are ones that are making Himes lock-bottom boxes; there were the ones that were making the Hyndman lock-bottom box; and there are others making lock-bottom boxes that are variations of, generally, this British Filmer patent; because a gluing machine manufacturer came out in his catalogue of gluers, which are full of pictures and specifications [146] and so forth, and brought out this fact that the Filmer British patent on a lock-bottom box could be made on his machine; and if it was made in a certain way with a certain variation of the drawings and specifications as shown on the Filmer British patent, it intimated that people were perfectly safe in making it; it was public domain.

And a lot of the bigger boys made it. If you would go around and talk to them about a license they would show them to you—"Here, Hyndman,

(Testimony of Meade A. Hyndman.)

we are making this now; what do we want a license for?" and that was some of the biggest boys in the industry. They are making that variation of the British Filmer patent, and others of their own. Gosh, some of them have got licenses on—the last few years—on a lock-bottom box.

Q. Let's stick to the questions. The next question I would like to ask you, and I think this will be my last—— A. Go ahead.

Q. Do you have any idea of how many lock-bottom boxes are manufactured annually in the United States?

A. No; no. It would be a pure guess on my part.

Mr. Mellin: If your Honor please, I don't think we ought to indulge in guesses.

The Court: No.

A. (Continuing): I can tell you one firm in one year. [147] I know what I sold.

Q. (By Mr. Smith): Would you tell us?

A. That is the Acme Folding Box Company in St. Louis, Missouri, in the first year that Ross Himes got his machine in there due to my earnest solicitation that they buy the machine, I sold nearly one hundred thousand dollars worth of them.

Q. Are you making lock-bottom boxes in this plant which you manage?

A. Oh, yes, we are making the Himes lock-bottom box under license from Nolo, which is Mr. Himes' corporation.

(Testimony of Meade A. Hyndman.)

Cross-Examination

By Mr. Mellin:

Q. As a matter of fact, your own company pays tribute in the form of royalties to this Parks patent? A. Yes.

Q. So your employers, as a matter of fact, don't agree with your opinion that the Parks patent is invalid and no good? A. Yes, they do.

Q. Now, this Acme Folding Box Company that you spoke of in St. Louis, that was also a licensee under the Parks patent; isn't that right?

A. Yes. [148]

Q. And the first time you saw a commercial box was this box brought out by the Himes Company; isn't that so—commercially, a lock-bottom box?

A. Yes.

Q. And you were very enthused about it being a great advance in the industry, weren't you?

A. Oh, yes.

Q. And you went out and sold—one hundred thousand dollars worth would be in the numbers of millions of boxes, wouldn't it? A. Yes.

Q. You said something to the jury about damages that were awarded against you—some amount like twenty-five thousand dollars; didn't you say that?

A. I don't know what was awarded against me. I know that that was what you mentioned in your notice of suit to me or to the Court.

Q. Will you tell the jury actually how much

(Testimony of Meade A. Hyndman.)

those damages were that were adjudged against you; will you tell the jury?

A. I don't remember right offhand, sir.

Q. It wasn't any sum like twenty-five thousand dollars, was it?

A. No. The final release was for—accepting a nominal sum and granting me full release for all judgment [149] rendered.

Q. Five hundred forty-two dollars and eighteen cents was the sum, was it not?

A. I don't remember that.

Q. You had a copy of the final judgment?

A. The final judgment?

Q. Yes.

A. I don't believe I ever had a copy of that.

Q. You never were that interested, were you?

A. Not much, no.

Q. As a matter of fact, it took us eight months with the detectives to serve you in that suit—you conscientiously avoided it?

A. Then you had very stupid detectives, sir, because everyone in Los Angeles in the folding box business knew where I was. My name was in the phone book.

Q. But you spent a great deal of time elsewhere than in Los Angeles, weren't you?

A. Oh, I was feverishly trying to license firms to use my box and pay me money.

Q. Exactly how many licensees did you have?

A. That I don't remember now, sir.

Q. Three? A. Three, yes, sir.

(Testimony of Meade A. Hyndman.)

Q. That was about all, wasn't it? [150]

A. No.

Q. It might have been four?

A. It might have been—or more.

Q. And one of them was this Chadwick, this present defendant, was it not? A. Yes, sir.

Q. I show you a box and I will ask you if that isn't the box that you made?

A. Yes, sir—one.

Q. I will ask you if you didn't circularize all of the Himes licensees? A. Wait a minute.

Q. I think that is your handwriting on the box, isn't it?

A. (Witness takes out glasses and puts them on.) No; no, this is not my box and it is not my handwriting. It is not my printing.

Q. Is it someone's printing you recognize?

A. No, I do not.

Q. Do you recognize the structure of the box?

A. I would recognize it better if I could have the privilege of tearing it down.

Q. Go ahead.

A. I won't destroy it. (Witness takes box apart by ungluing flaps.)

Q. Have you got that broken up? I have one here. [151]

A. All right, I will take that. This is not my box—at least I never made it. It is too poor a job of die making.

Q. How does it compare in exact formation with the boxes that you circularized the Himes licensees

(Testimony of Meade A. Hyndman.)

with in an endeavor to license them under the Himes patent, under the later Hyndman patent?

A. It is substantially the same as mine, lacking numerous essential refinements in die work. This is a box I never had any contact with—this particular sample.

Q. But it was a fact wasn't it that you did circularize the Himes licensees—each one of them?

A. Oh, now, wait; if you are trying to bring out the fact that I tried to wean Himes' licensees away from Himes and to me you are in error.

Q. I am not trying to draw that inference.

A. I never knowingly solicited one of Himes' licensees. In fact when I did so, when they got a letter of mine and they wanted to license under my patents as well as Himes', I refused to license them, telling them to stick to Himes. I have that correspondence.

Q. Do you have it with you? A. No.

Q. Isn't it a fact that you advised these prospects that you approached if they needed the Hyndman box they would be [152] free of the Parks patent? A. No.

Q. You didn't do that?

A. No, we never mentioned the Parks patent.

Q. In that suit which you mentioned you were perpetually enjoined from selling the boxes that you were making by the Court in the Southern District of California, weren't you?

A. Oh, I suppose so. Naturally you are going to get—

(Testimony of Meade A. Hyndman.)

Q. I will hand you what appears to be a copy of the judgment and ask you if that isn't a true copy of the judgment which was rendered?

A. I wouldn't know that now, sir. I don't remember having received a copy of this judgment.

Q. You remember receiving a——

A. Copy of the notice you were going to——

Q. You also remember receiving a writ of injunction don't you? A. Yes, I remember that.

Q. Yes, you recall that don't you?

A. Now, a writ of injunction; no, I don't recall that. All I remember is that I received a notice that dire things were going to happen.

Q. You also recall, don't you, an injunction against you for five hundred and sixteen dollars against you for the [153] attorneys' fees awarded in this case and damages? A. I got that.

Q. You remember that?

A. Yes, I got that.

Q. And it wasn't for any amount like twenty-five thousand dollars?

A. Well, I thought that was merely a play of words—the five hundred dollars—because in the original notice of suit it said I was to be sued for being such a bad boy for the sum of over twenty-five thousand dollars, upon which triple claim—triple damages could be asked for and attorneys' fees and Court costs.

Q. I will read you this and ask you if you don't recall it:

“That defendant Meade Hyndman, his agents,

(Testimony of Meade A. Hyndman.)

servants, employees and all of those in privity with him, are hereby directly—(reading)—selling or causing to be sold, using, or causing to be used, folding paper cartons coming within the scope of United States Letters Patent 2011232 and infringing upon and violating said Letters Patent in any manner whatsoever.”

Don't you recall receiving an injunction with words to that effect? [154]

A. No, I do not. Undoubtedly I received it but I don't recall it, no sir.

Q. Do you recall that the judgment was served on you which provided this “that plaintiffs herein shall have and recover attorneys' fees incurred by said plaintiffs in this action in the amount of five hundred dollars.” Do you recall that?

A. Well, I recall some sum.

Q. And then you recall that the costs awarded were \$42.17 and that was the total amount of the judgment; you recall that?

A. Not in detail. It was of little interest to me.

Q. Now, all of these activities of yours in connection with lock-bottom boxes that you speak of—at least, this licensing—was within the last two or three years, wasn't it?

A. Yes; three years.

Q. And your feverish activity that you related with respect to lock-bottom boxes was all subsequent to the time that you learned of the Himes box as you called it or the Parks box, and the use thereof by your employers, isn't that correct?

A. Do that over.

(Testimony of Meade A. Hyndman.)

Q. Strike the question. I will reframe it: Your activity in automatic lock-bottom boxes all commenced sometime [155] after you first saw a Parks box as made by the Acme Folding Box Company, isn't that correct?

A. My activity—let's substitute Himes box instead of Parks patent.

Q. All right.

A. I didn't know anything about the Parks patent. It is just recently I heard about the Parks patent when somebody told me Himes was going to buy it to strengthen his patents.

Q. When did you first learn about the Parks patent?

A. Oh, I first learned about the Parks patent a year and a half or two years ago—about the time—I thought about the time you fellows bought it or Himes bought it.

Q. That would be 1946 would it? A. '46?

Q. Yes.

A. No; it was later than that.

Q. Now, as a matter of fact you knew all about the Parks patent as early as 1940, didn't you; that would be eleven years ago—not a year and a half ago?

A. Not that I recall, sir. I may have seen it eleven years ago.

Q. I will refresh your memory. I show you here what is a certified copy of a patent to Meade Hyndman number 2298565. The patent was granted October 13, 1942? [156]

(Testimony of Meade A. Hyndman.)

A. And that was cited against me—Parks?

Q. Yes, that is correct. Now you recall it?

A. No, now, wait a minute—don't let's do that because I could have seen it then and still not recognized its value at the time.

Q. I see. But you would have known of it?

A. I undoubtedly knew of it if it was cited against me.

Q. In the boxes that you actually made and endeavored to license, you didn't follow the teachings of this Berkowitz patent as shown in the drawing that you testified to, did you; you didn't make them that way? A. No.

Q. Why didn't you?

A. I didn't know anything about the Berkowitz patent at that time.

Q. When did you first learn of the Berkowitz patent?

A. Shortly after this Parks patent sunk into my consciousness.

Q. Then you learned of the Berkowitz patent?

A. Then I learned of the Berkowitz patent.

Q. Then you learned of the Berkowitz patent before you started to grant these three licenses during the last three years, didn't you?

A. No; after I granted the licenses.

Q. Just exactly when did you learn of the Berkowitz patent? [157]

A. Well, I learned of the Berkowitz patent two years ago.

(Testimony of Meade A. Hyndman.)

Q. That was for the first time?

A. Well, as far as I can remember. I said I could only remember the Parks patent, here, two years ago; then you show me where I knew of it—must have known of it if it was cited against a patent application of mine—I must have known of it eleven years ago but it didn't sink into my consciousness.

Q. I see.

A. I didn't realize what it was.

Q. I don't want to misquote you; but I understood you to say when you started to think for yourself about these interlocking-bottom boxes that you looked at the Parks patent and said, "Here it is—Himes really has something good in this Parks patent." Didn't you say that? A. Yes.

Q. Then as I recall your testimony you said, "Then I made some searches and I found this Berkowitz patent." A. Yes.

Q. When was that?

A. That was two years ago.

Q. Just two years ago?

A. When the Parks patent sunk into my consciousness through Himes buying it. I said, "He is too smart to go out and buy something that is not of very definite value to him." [158] Then when this folding box manufacturer told me that it was to be purchased by Himes to strengthen his present patents, the Himes patents, then I looked up the Parks patent and got a copy of it. Then I said,

(Testimony of Meade A. Hyndman.)

“By golly, it does strengthen it.” Then and then only—I know it sounds stupid—criminally stupid to realize here is a patent on a small box like this that I had associated in my mind with tooth paste cartons and flour cartons and little cartons—tucked in on one end—to realize, you can make it any size; you can lengthen it out the same as Himes is doing with his and the same as I am doing with mine. I am stupid at times, sir. Then I looked up anything I could find. And Berkowitz was one of them that was called to my attention.

Q. As a matter of fact, the Berkowitz box made in accordance with that drawing isn’t a practical box in industry is it? A. Practical?

Q. Yes. A. Today?

Q. Yes, made according to that drawing?

A. Yes.

Q. Can you make that box in any dimensions except perfectly square? [159] A. Yes.

Q. And it will then fold flat and unfold—unlock? A. Yes.

Q. Are you absolutely certain of that?

A. I am never certain of anything, sir.

Q. What I am asking you and I would like a very definite answer for the jury. I am asking you if you follow this drawing and cut and fold the Berkowitz box as shown there, whether or not you can follow that teaching and make that box anywhere except where these walls are of equal length?

A. Wait, that is rather ambiguous. Your drawing is on a square box.

(Testimony of Meade A. Hyndman.)

Q. All right.

A. Now, do you mean can I make a box oblong——

Q. Yes.

A. ——any size, any grade of stock——

Q. Yes.

A. ——in that construction——

Q. As shown in this drawing, Exhibit “12”?

A. ——and have it function?

Q. Make it like that drawing and have it function, yes? A. Yes.

Q. Now, I am not going to go any further. I want you to be absolutely certain that that is so. I want you to [160] just say you are absolutely certain?

A. Oh, I wouldn't say I was absolutely certain my wife loved me. I hope she does but I will not be absolutely certain of anything in this world, sir.

Q. But you are sure it can be done?

A. I am almost positive—to the point where I will bet you money.

Q. Well, you can't do that in a Court but I would like to take it.

A. I am certain it can be made in an oblong square, anyway. I will make that Berkowitz box exactly like that. Now, if you will let me put that one panel on the inside of the box I will make it on high-speed automatic machinery. It is on the market today with one or two attachments which I will put on it—with the two attachments—ten dollars apiece. I will glue it at high speed today. That

(Testimony of Meade A. Hyndman.)

is more than they could do back in those days. They had no such machinery.

Q. Now, the Parks patent was purchased by Himes in 1946; is that about the time when someone told you that Himes was about to purchase the Parks patent? That is of record here. You heard it yesterday when you were sitting in the Court room.

A. I don't know. I could tell you the exact date if I had my expense account records with me. I could tell [161] you the exact date I heard it and from whom I heard it.

Q. Well, the expense account records for what company?

A. My own personal expense account records. I have kept them for many, many years for income tax purposes.

Q. Do you know of anyone who is commercially making a box as Berkowitz's?

A. No; it is unnecessary today. There are other methods of making it that are better.

Q. The Parks is one?

A. The Parks is one. The Himes is one. The Hyndman is one and the Filmer is one.

Q. Filmer is one? A. Yes.

Q. Who makes the Filmer box?

A. Nobody—only a variation of it.

Q. I see. And that variation of it came after the Parks box and those were on the market didn't it?

A. The Parks box never has been on the market.

(Testimony of Meade A. Hyndman.)

There never have been any boxes on the market commercially except Himes and Hyndman.

Q. Who put out your boxes?

A. Who put out mine?

Q. Yes; who made them commercially?

A. Mr. Chadwick made them commercially of the Coast Carton Company, for one. [162]

Q. That box that he has always made is the one on which he is being sued for infringement here, isn't it?

A. I don't know.

Q. The box right in front of you.

A. This?

Q. Yes; that is the only type of locking folding bottom he has made isn't it?

A. I don't know. Did he make this?

Q. Well, I will assure you that he did.

A. Well, this is one form of the lock-bottom boxes. You know, when it comes to—oh, shut up.

Q. To refresh your memory as to this Berkowitz box I tell you that that same certified copy of an application for the patent application you filed, on September 7, 1940, is the date, and I call your attention to the fact that both Parks and Berkowitz are referred to there; would you say in view of that that you learned of Berkowitz in 1940—and not two years ago?

A. No. I would say that I knew of it at the time this was brought to my attention, but I will say that it did not sink into my consciousness, and I might say that I never saw it because John D.

(Testimony of Meade A. Hyndman.)

Rippe was my attorney at that time and he was so much smarter than I was, that he wrote up these objections to different things cited against my patents when I was out of town. I was a [163] traveling salesman and out of town a great deal of my time and he took care of those things for me and I had supreme confidence in him.

Q. You specifically recall that that is what he did in that case?

A. No. I may have seen it, but if I did, it did not sink into my consciousness; a lot of things are discernible that are not perceptible.

Q. Mr. Hyndman, to a box man that has had the experience that you have had, you could by just merely looking at the blank in the drawing in Berkowitz, immediately recognize how it worked and the fact of its value—that it was automatic—you wouldn't need to have it sink into your consciousness would you?

A. Yes, I would. I didn't know near as much about lock-bottom boxes then as I do now. Ross Himes was the first man in the world to ever show me a lock-bottom box—the first man in the world. And then I thought, "How stupid you are,"—I mean, meaning me.

Q. Now in connection with the Parks box and the Parks patent disclosure and the Berkowitz disclosure as well as the Filmer patent you spoke of?

A. Yes, sir.

Q. Now the experts in the Patent Office had both

(Testimony of Meade A. Hyndman.)

the Berkowitz and the Filmer patents before it when they issued [164] the Parks patent and considered it; so then your position is that you disagreed with the Patent Office experts?

A. Yes, sir; I disagree with the Patent Office experts. I often have.

Q. Pardon?

A. They are rushed—there are so many of these patents in there in the office.

Q. Have you ever been in there?

A. Have I ever been in there?

Q. Yes? A. Oh, yes.

Q. You argued the Berkowitz patent and so on?

A. Oh, God forbid, no. I mean if I did you guys would make a monkey out of me quick. I do know what they are up against.

Q. Of course, it wouldn't be much of a trick to make Berkowitz's a practical box in view of the knowledge that you have at this time from your experience in the box business—the automatic box business since 1940, would it? A. No; 1920.

Q. Well, since 1920?

A. No. You would have to give me a little leeway to use my ingenuity and my skill.

Q. I see. And also you couldn't divorce from it the [165] knowledge that you have gained from all of the automatic boxes that you have seen and are presently on the market, could you?

(Question repeated by Reporter.)

(Testimony of Meade A. Hyndman.)

A. Yes, I could divorce it entirely from all I ever knew.

Q. (By Mr. Mellin): And make the Berkowitz box a practical box? A. Yes, sir.

Q. And in any shape of any relative lengths and widths so it would work?

A. Yes, sir; automatically within the scope of the machinery—the limitations of the machinery, not exactly—I am going to give you a break there—not exactly like that, because you are going to try to get me to glue over a glue flap and this thing was not glued. This thing was strung on a string there at one time on the outside of the box.

Q. Yes, but strung on a string, why—it was strung on a string so it would hold a load, wasn't it?

A. That was the only way they could hold the bloody thing together. You take those two lower edges and move them over and I will give you a better box than any box on the market today—Himes, Hyndman, Yackety-yack or Joe Blow, and I will give you a stronger box [166] without using any more stock—the minimum amount of stock. But you have got to——

Q. You have got to let yourself use the knowledge and experience you have gained all over the years, including the past years? A. No.

Q. You are not going to use that at all?

A. Not on lock-bottoms. I don't have to. If Himes had shown me that before he showed me your box, I would say throw that away.

Q. How was it that you didn't use it?

(Testimony of Meade A. Hyndman.)

A. God only knows. How is it that I didn't make it and I am supposed to be from coast to coast a pretty smart box man.

Q. When you made yours you didn't follow that one, did you?

A. I didn't know of it—although it was quoted against me. I don't know of it.

Q. Wouldn't you think that your now making a practical box would be something of the order that it is easy to discover America now that Columbus had done it?

A. No.

Mr. Mellin: Strike the question. That is [167] all.

Redirect Examination

By Mr. Smith:

Q. I believe your testimony was that your present employer is a licensee of the Nolo Company and of Mr. Himes; is that right?

A. Yes.

Q. Have you ever read the license agreement?

A. Do you mean Himes' agreement?

Q. Yes.

A. Oh, yes, four or five times with four or five copies.

Q. Does it include only the Parks patent?

Mr. Mellin: Your Honor, we will stipulate that it includes the Himes patent and the Parks patent.

The Witness: Which question do you wish me to answer, Mr. Smith?

Mr. Smith: We will strike the question.

The Witness: All right.

Q. (By Mr. Smith): Does your company, to

(Testimony of Meade A. Hyndman.)

your knowledge, pay license fees to the Himes Company?

A. Yes; sure, the Himes box is a good box.

Q. Do you have any choice in the matter of whether they do or do not pay those fees?

A. Me? [168]

Q. Yes.

A. No, I sell them. I have sold more Himes boxes in the Northwest here than were ever sold before in the history of the company, and Ross Himes is drawing a license fee on them, I hope.

Q. At the time that you learned of the apparent purchase of the Parks patent by Ross Himes, did it occur to you when you discovered Berkowitz that you might purchase it? A. Me?

Q. Yes, sir.

A. No, I don't want to purchase anything. I had all I could do to keep traveling the road, trying to peddle these licenses to other people. I had no money to purchase any.

Q. Or to defend yourself?

A. Or to defend myself.

Mr. Smith: Thank you, sir.

Mr. Mellin: No more questions.

(Witness excused.)

(Recess). [169]

(Cardboard carton marked in evidence as defendant's exhibit "14" for identification.)

Mr. Smith: I would like to call Mr. Chadwick, the defendant.

VIRGIL BLAINE CHADWICK

the defendant herein, called as witness by and on behalf of the defendant, being first duly sworn, was questioned and testified as follows:

Direct Examination

By Mr. Smith:

Q. Will you please state your name, your residence and your occupation?

A. Virgil Blaine Chadwick is my full name. My residence is at 3515 East Marion, Seattle, Washington. My present occupation is that of the owner, operator and manager of the Coast Carton Company of this city.

Q. How long have you had this present occupation?

A. I have been the owner of the company for the last—practically four years now; three and a half or four years.

Q. Prior to that what did you do?

A. Prior to that I spent a year and a half—about a year or a year and a half studying the industry, going from coast to coast, going up and down the coast, [170] visiting all of the major plants in the East and here in order to familiarize myself with this folding box industry. My stepfather who was Mr. Norrie founded this Coast Carton Company at Seattle about 47 years ago. His

(Testimony of Virgil Blaine Chadwick.)

son was killed in the Spanish War. He had no heir and he asked me to come into the box making box company with him. In order to do so I felt I had to familiarize myself with the industry because you can not step in as the owner without being familiar with the business from top to bottom. I tried to familiarize myself with every machine and process and bit of thinking connected with the industry.

Prior to that I was with the Boeing Airplane Company. I had charge of the B-29 and its construction at Wichita. I had worked up to that position from a rather humble beginning with the plant here. Prior to that I was with the General Motors Corporation in Oakland, California.

Q. Do you have any other present activities beyond those of the Coast Carton Company at this time?

A. Well, yes. I have a family to raise and I have quite an interest in my church activities. I hold rather a responsible job there and I am very, very interested in the boy scouts.

Q. It just happens that laying before you is defendant's [171] exhibit "1." Can you identify that, please?

A. That is a carton we manufacture for a firm in Tacoma.

Q. What type of a carton would you say it is?

A. It is an automatic lock bottom box.

Q. In its present form is it an automatic lock bottom box?

A. In its present form it is a pattern of an auto-

(Testimony of Virgil Blaine Chadwick.)

matic lock bottom box. After it is glued together it would become a carton.

Q. What peculiarity do you find that makes that an automatic lock bottom box?

A. Well, naturally its construction; but the point of its construction is the method of the lock engaging after it is set up in order to lock, as the wording says, to lock the bottom in place so that it can be held rigid while it is being loaded by the consumer or the customer. After the gluing operations, the box is kept flat as has been illustrated prior by the other witnesses; and then as it folds up these two locks engage on the bottom and keep it in a rigid position. These two locks here are essentially the primary factor of the box.

Q. Can you show us half of the gluing up of the bottom; what the bottom would look like then?

A. Well, in our operation we take and put it through a [172] machine that has little fingers. It has an endless belt and on this belt there is a little cam there with a finger extended flat. As it goes over a bar it raises a little wheel which bends this finger up in that fashion and that finger comes in and folds this over. At the same time as it goes through the machine it hits a rod that bends that back so in one section of the machine that happens. Then at the same time that—a step later in the machine another finger comes up and bends this over just like that. It progresses through and the glue is either placed on this panel here or this one here, depending on how the operator set the

(Testimony of Virgil Blaine Chadwick.)

machine up. And at a later point the two are folded over. When they are folded over I get this picture here in the flat pattern; and in the erected pattern we have that picture there so that we have a right angle on the bottom with a diagonal across on the corner.

Q. This tab on this defendant's exhibit "1," does it have a name in the industry?

A. Oh, depending on whether you are North, East, South or West—every area has its own vernacular—it is usually called' around here the glue tab or the diagonal tab. It is an optional name. In our particular plant we call it the glue flap. [173]

Q. Is that the tab that you say is pressed down by this bar in the machine? A. Yes.

Q. At this time would you explain with the exhibit "1" before you in what direction is it travelling as it passes through the machine?

A. We feed them in in this manner (indicating). The machine is a very long machine. It is as long as from here probably back to the second or third row of benches back there. We feed them in the machine in this manner. There are three sections of the machine. The first is called primarily the timing section. There are little lugs that come up and as they are fed through feed wheels they come to a momentary pause and then the little lugs coming along on the chains hit the box—you can set it any place as long as they are identical. They hit the box and push it through so that the next one coming along will be exactly in time to the first one.

(Testimony of Virgil Blaine Chadwick.)

That is necessary in the machine because everything is on an endless belt and everything must be timed rather precisely. The glue is applied by a circular wheel which in turn must be a time mechanism. As these come through they are hit by two time lugs, one on each side. The first section of the machine performs this operation and does [174] the two sides simultaneously. The next section of the machine these two tabs are folded forward (indicating and illustrating) then a glue wheel right between the sections applies the glue. Then the third section of the machine has two belts. You just lift this over like that (indicating) and bring these two down and there is a strip of glue on here and they just come into meeting each other at this point then they progress through weighted rollers as Mr. Himes has testified.

Q. Is that glue flap attached to one of those bottom sections ever bent down and under in your gluing operation?

A. No. It would be an impossibility.

Q. Why would it be impossible?

A. Well, the machine's construction would prevent us from doing so. Secondly, to have the apparatus come down and try to force it under in our machine, which is a straight line machine—in other words, all operations are in one straight line—it would slow the machine down. Our machine is rather a fast machine. It is one of the latest machines developed—and they cannot perform in that fashion. It must of necessity follow the buckets

(Testimony of Virgil Blaine Chadwick.)

which are designed in the machine and come up. There is no way it could be forced under in our machine. If it went down it would hit our [175] chains—it would hit our carriage belts. There is no possible way to do it, sir.

Q. The way that you have described is the only possible way on your machine?

A. That is correct, yes, sir.

Q. What kind of a machine is that?

A. It is a Staude Master Gluer put out by the Sperry Corporation of St. Paul, Minnesota.

Q. You call that a straight line machine?

A. No. The name is called the "Staude Master Gluer." They use the word "master" and kind of pat themselves on the back a little bit because it is the master of all boxes—that is the slogan—and it is a very versatile machine.

Q. The other machines on the market of which you know, what are they?

A. The International people put out a so-called "5-Z" machine which is a competitor but instead of being a straight line machine the boxes proceed part way and then are cut at right angles. That is called a right angle machine. The only other machine that I know of is the Nolox machine which is also a right angle machine.

Q. And in the right angle machine the boxes travel in one direction for a ways and then they move laterally [176] for aways, is that right?

A. That is right.

(Testimony of Virgil Blaine Chadwick.)

Q. Have you ever folded boxes such as the exhibit "1" before you two at a time?

A. To be absolutely ethical in my answer I would have to say no; this box is too large to do that. I have folded a similar box of a much smaller nature two at a time.

Q. The folding of the bottom panels in an operation two at a time is identical to this, is that right?

A. It is identical on this panel. You will have another series of flaps out here which would be accomplished in the same manner excepting that you have a set of fingers on this side and also on this side. But the operation is the same essentially for both sides of the box but operate simultaneously.

Q. Does that give you any advantage of production?

A. Not essentially. In previous testimony here quite an issue has been made about the fact that it is so much faster. But to a person who is in the practical necessity of earning their living every day by it, it is not a great advantage on our machine. We have tried it on two or three occasions. The idea looks nice but it has a very limited practical application. I believe you have an exhibit here that was offered in evidence. [177] If I can have it I would like to use it, if I may.

Q. Would this be the exhibit you are speaking about? A. Yes.

Q. This is plaintiffs' exhibit "K-1"?

A. That is fine. This machine that we have—

(Testimony of Virgil Blaine Chadwick.)

with your permission I will give a short description of it. The machine has got these chains that I told you about that act as a timing mechanism to pick this up and push it through the machine. Those chains naturally there is some limitation to what a machine can do. And in this machine the lugs are spaced thirteen inches apart. Now then, you have an operation of either fitting in within the first twelve and seven-eighths inches or jumping one notch and going to twenty-six or twenty-five and seven-eighths inches. You must have about an eighth of an inch or a quarter of an inch at the very minimum to clear the boxes. So if I have a blank that I can get within thirteen inches in the over-all pattern, then I can put them through two at a time and, when I do that, we slow our machine down approximately about—oh, a third, when we do it, because of the complexity of the double folding action occurring simultaneously. But it does give us a little increased production on a small blank that we can handle. Now then, if that blank gets over thirteen inches in [178] length, naturally I have to skip the lugs and use only every other lug, so my production immediately is cut in half. Even if the machine was running wide open the production is cut in half because I have to use every other lug. So each box presents its own particular ramifications. You have to decide in your own mind where the advantage lies—whether to take them in single form and run them through and run the machine at a fast speed or whether to skip

(Testimony of Virgil Blaine Chadwick.)

every other lug, take about a third loss on the production speed of the machine and get them in the double form. We have so far made three runs like that, trying it out, and it has not proven in our operation too practical. On a right angle machine, that is probably designed for it, it would probably have a better application. But to us it is not a particularly large advantage. Like I say, if you have got certain specifications methods—the blank is so small that it will fit within the first set of lugs you probably would have fifteen or twenty per cent advantage in your over-all production.

Q. It would not be double?

A. No, not by a long ways. We have never been able to prove that. That is the ideal and it is just a theoretical thing on paper that can't be proven.

Q. Do you know anyone who ever has approached that? [179]

A. No. I am not too familiar with all of the people in the right angle operation. Because I have bought a Staude Master, I have naturally talked to people who operate Staude Masters more than I have to the others. But nobody I have talked to has found any particular advantage in it. In fact, every time I have mentioned it to my people in the plant who are technicians in their own right, I have been pretty well talked down on it.

Q. Can you tell us briefly how you came to be manufacturing boxes according to defendant's exhibit "1"?

A. Yes. I am not sure of my dates but they

(Testimony of Virgil Blaine Chadwick.)

can be verified if requested by the Court. It was about three years ago or maybe three and a half years ago, Mr. Meade Hyndman circularized me with a letter—I say circularized me—wrote me a letter and asked me if I would be interested in an automatic box that would be operated under his patents. Every letter I get like that I write back to them, “By all means, yes; send it in.” I never know when I am going to find the gold mine that is going to make our factory grow and blossom so I answer every inventor’s letter with the reply by all means I am interested. About a week later Mr. Hyndman showed up in Seattle and came to see me and he showed me some patents that were [180] issued by the United States Patent Office. These patents gave him the right to manufacture cartons and they described methods of diagonal fold and so on. I went over them—I went over his patent, read the claims contained therein and made some samples by it. I made a production run of part of the Hyndman box. And we tried to find fault with it. Mr. Hyndman worked with me and gave me samples. He said, “Here are the variations under which you can manufacture your box.” We discussed those and he said, “These are your diemaker skill—and in fact we developed a few angles in our own plant for making this box.

It was borne in on me at a very early time that these drawings that you see are a one flat pattern drawing giving one certain style of box. It might be square, it might be oblong—any proportion you

(Testimony of Virgil Blaine Chadwick.)

may have. Whatever the artist happens to sit down and draw. Whenever you adapt the drawing on a patent to a box which is of a different size than what the patent has drawn you must of necessity read the patent and adapt the wording in the patent to the box you manufacture as well as being guided by the picture. All the picture does is guide you. It is just like a woman buys a pattern for a dress, it guides her in her thinking. If she has to make a bigger hole in the [181] armpit because she wants more freedom she digresses from the design to do so. If she wants a longer hem they digress from it. In other words, they digress from the pattern furnished to fit the particular circumstances required. We do in the box business. We follow a pattern but we digress from it as necessity requires to fit the various sizes and styles that come about. It does not mean that we have altered it or changed the basic idea. We have merely adapted it to a variation of sizes, following the same general thinking.

Mr. Meade showed me some of those variations. After he had shown them to me, I agreed to take on the license; I became a licensee and I paid him a sum of money for the privilege of manufacturing under his license. We started to manufacture. We didn't find it a bed of roses to go out and sell this box. This idea that everybody was ready to jump up in open arms for this box is not true. A lot of people have bought it. There is a lot of opposition

(Testimony of Virgil Blaine Chadwick.)

to it. Let me have a box, please, that is all glued—any box.

Q. I have here defendant's exhibit "15" which has been offered in evidence.

(Carton marked in evidence as defendant's exhibit "15" for identification.) [182]

A. Just any of them. There is a lot of opposition to this box. I mean it isn't the answer by any means. You set this box and what do you have—you have holes in here and holes along through here where dirt can seep in, where infestations can start. You have a lock on the bottom here that can and does on occasion stick up into the product; so you are limited as to some of the things that you can put into it. It isn't the complete answer. If it was I certainly would have a lot more of the industry in the Northwest buying this particular type of box. It answers a certain need and it is one of many styles we manufacture.

The box we started to sell it and we were successful in some sales. As time has progressed over the last four years we have built up some volume in it.

I think since I had the patent—I am not sure—our sales have been only somewhere around fifty thousand to sixty or seventy thousand. I think you have the figures on that. So our volume of this is only growing probably to meet a certain specific situation wherein it fits.

About two years ago—maybe not quite that long

(Testimony of Virgil Blaine Chadwick.)

ago—but approximately at that time, Mr. Hyndman wrote me a letter. And simultaneously at the same time I was served notice by the plaintiff in this case that [183] we were infringing a patent that he had there and just what was I going to do about it, that I had better stop making it. So I get all excited and I got Meade's letter and it told me he was going to have to revoke the license because of the suit. And I got all excited about it and said, "Why? The United States Patent Office issued you a patent, didn't it; do they know what they are doing; don't you know what you are doing; I paid you good money for this; what is the result here; don't I have a right to manufacture something you told me I could do?" He wrote back and told me that he had been investigating this patent—that circumstances had come up that made it evident that the patent had been anticipated and that consequently his patent was not a valid patent. And at the same time he advised me that the patent of the people who were the plaintiffs in this case was also invalid—that they had no right to sue because they had no patent that was valid because it was only based on what was known in the industry prior to the issuance of the patent and therefore, as Mr. Meade Hyndman's patent was invalid so also was the Himes' patent invalid; and that I should be free to go ahead and manufacture.

Well, to be frank to you, that looked like an awful mess to me. After all, I was just trying to [184] get along here in town and keep my factory go-

(Testimony of Virgil Blaine Chadwick.)

ing. I am not a specialist in law and I am not a specialist in patents. I have been trying to operate a factory out there. I have been at one time from janitor on up to doing the wrapping and operating the machines. So I finally have to become a patent expert I guess. I got all of these patents together. I went into them. I wrote Meade and got his opinion. I talked to other people. The last time I was in Chicago I talked to the people there. I talked to the people in Philadelphia and New York. When I came back, I came back with the thinking that Mr. Hyndman was correct; that neither his patent nor the patent issued to Mr. Himes was valid because everything they had had been anticipated at a prior time. And so I continued to manufacture the boxes, feeling I was harming no one, and doing nothing more than was my God-given right under the constitution of the United States to take those things which were in the public domain and I have continued to do that up to this trial. I believe that essentially covered my position.

Q. I have here Defendant's exhibit "14." I believe if you will examine it, having in mind the cartons of plaintiffs' exhibit "J" you will find a similarity between the carton of "14" and the carton exhibit "J"? [185]

A. Do you mean I am supposed to open these up?

Q. Yes, you may untie them; I am sure it is quite all right.

The Witness: You know I am scared to death.

(Testimony of Virgil Blaine Chadwick.)

Can I have a drink of water? The last time I was this scared, your Honor, is when I was a missionary and I was called upon, on the street, to address an audience. That is something you don't want to get into.

Now what is it you wanted me to do here?

Q. (By Mr. Smith): Is there a carton like that in the group of ten that constitutes exhibit "J"?

A. Yes; there is one right here.

Q. Is there anything—

A. These are identical. They are marked with the Himes patent number, 2011232 which to my understanding is the Parks patent—not a Himes patent. But it is marked here a Himes patent number.

Q. The number that you read again is it this number 2011232 (indicating on chart)?

A. Yes.

Q. But the wording is what, again?

A. "Himes patent number."

Q. Do you see a similarity between the bottom construction of defendant's exhibit "14" and defendant's exhibit "15"? [186]

A. Do I see a similiarity in construction?

Q. Yes, sir.

A. Well, yes, there is a similarity.

Q. Can you show the jury what is similar?

A. Well, we both use the diagonal fold; the bottom of the box which must come in to meet. They are both glued together on these panels. They both have a locking tab, here. This area in here is iden-

(Testimony of Virgil Blaine Chadwick.)

tical to this area in here. So that as they are set up, why, they come together and lock and cannot be re-collapsed again. This one, through use in the Court here, has been torn. But they are both pretty much the same. You can see here how they come together. These two are torn.

Q. Do you see any similarity in the construction of either of those models and of either of these patents here over on the easel?

A. Well, in my opinion these cartons correspond more closely to the one on the right, here.

Q. Can you demonstrate that for the benefit of the people here? I hand you a pair of scissors. (Handing a pair of scissors to the witness.)

A. Well, both my carton and this carton on here have waste material on them. There is no question about that. Mr. Himes brought that out here yesterday.

Q. Whom? [187]

A. Mr. Himes.

Q. Yes.

A. He brought out that there is waste material in these boxes. I guess waste material might be considered like the hem on a garment. You fold it over to give appearance and strength but actually it is not required. You can just cut it off straight. If you leave it on for any utility that might be there, it is not actually of necessity to the carton. If I may mutilate this, I believe I can demonstrate some of the points, here.

Q. Yes; you can go right ahead.

(Testimony of Virgil Blaine Chadwick.)

(Witness takes scissors and cuts off the corner of a fold on the bottom of the box. Witness cuts off a second piece of the box.)

Q. (By Mr. Smith): Are those pieces you have just removed the waste material we saw yesterday?

A. Yes; they correspond more closely than that. You notice that after I have taken the piece of waste material out that it will still fold.

Mr. Mellin: May I call your attention to the fact that that box is torn?

The Witness: Yes. I called the Court's attention to the fact that it was torn before I started. It is difficult to operate with a torn piece of merchandise. [188]

Mr. Mellin: I will show you one that is already cut and will save you the trouble. Without that tear. Will you open the box and see if that will latch—oh, don't use your finger—just hold the corners—don't fudge it.

The Witness: May I ask my Counsel a question?

The Court: Well, you are here to answer questions.

The Witness: All right, sir.

A. I can take a pair of scissors and cut anything to fit—just like I can take a dress pattern and cut it to fit a person.

I have cut this pattern—as you see here mine will come in and lock because it was cut that way. He—in presenting one to be presented to me here—has deliberately cut it so it won't fit. You will see

(Testimony of Virgil Blaine Chadwick.)

where he has drawn his line so they will not fit at all. I can take this carton here and cut it and it does come in and fit perfectly because I have not taken out more than is required.

Q. (By Mr. Smith): Will you go on with your demonstration, Mr. Chadwick, please?

A. Yes. You can always cut out more than is required so it will not fit. But I am trying to put on a [189] practical demonstration.

When this carton is opened up you will notice that there are two tabs here which yesterday on my carton were removed as waste material, and here is a piece of waste material that is removed from this carton here. I am going to take that and cover that up and I want to use this piece here he has to do that with.

Mr. Mellin: If your Honor please, I would prefer that that not be done.

The Court: Very well.

Q. (By Mr. Smith): Here is another box.

A. I will save this one. It might be I can still work it with this one I already have.

Q. All right.

A. If I take this carton and cut along this line right here (cutting carton) and drop it down; and I take this one here and cut along a similar line on the opposite side of the box, (cutting on bottom edge of carton) and I take the scissors and remove this waste material from the bottom of this carton as was done yesterday. Because after all it is superfluous (cuts it off). It might contribute in

(Testimony of Virgil Blaine Chadwick.)

some respect to the carton but in the essential operation it has no bearing. I remove those two, there, (cutting again) I put the waste material aside, and when I extend the flaps down— [190] remembering that I do not have enough material here because I had to start with the box instead of starting with a blank piece of material. I do not have the material here to make my little glue flap that formerly would glue here instead of being on one piece of material. I have in effect the same pattern that you see there on that box.

Q. Could you take it over and show what you mean?

(Witness approaches easel.)

A. If I hang my carton side by side with this box we have the same flap coming down and the same locking device. We have that same thing on this side,—the same locking device coming down. It is essentially that box there. I would have to extend a little glue flap up here to rejoin this box at this point. I would have to have a glue flap over here also to extend and join it. As you see I have plenty of material here to do that. So here I have a box which is exactly like the Berkowitz box. That was cut from the plaintiffs' box without any alterations and without any adulterations.

Q. Would the same thing happen if you used your own box? A. Yes.

Q. Can you show us briefly and quickly?

(Testimony of Virgil Blaine Chadwick.)

A. This box is torn. Will there be an objection?

Q. Well, let's start with one right off of the machine, [191] (handing witness a folded box form).

A. (Witness cuts on box.) You can see I am reaching through here and trying to cut through as that one is there up on the chart, through the diagonal corners. I pull out that piece of waste material, there, because it doesn't need it. (Witness cuts a second corner of bottom flap off.) There is that piece, there. Now I have that box with those two pieces of waste material removed from them; so you can see that the locking tabs here, as in that design over there are still held intact. This part here is left on essentially as I pointed out a little while ago for dust protection, for dirt and things of that nature. There is no use throwing it away if it is going to offer a service to the customer. We can throw it away and still be within the realm of our operation under the patent; just as I can throw this piece of material away at the top. It is waste. But we leave it there so that the customer can get dust protection on the top of his carton when he closes the lid. That is the same manner this one is left on in the bottom of that carton there. As the cartons come together they will lock in the bottom, there. Do you see what I mean (indicating by setting up the carton)?

Q. Will that bottom collapse up or down in the present [192] condition?

(Testimony of Virgil Blaine Chadwick.)

A. Do you mean after it is locked together?

Q. Yes. A. No.

Q. Can you show that in any way at all before we go further?

A. Yes. This carton here will take all of the pressure I want to give it. If you have a weight I can drop a weight into it and it will hold firmly. We can push it up here and the carton will hold its own weight. It must be locked together because you have a locking tab, here, that binds and bites. I will take this one in its open position just as I did on the box there and come along the same line. (Cuts bottom edge of Nalley's Potato Chip Box with which the witness is demonstrating. Opens the box up flat.) I open it up again. This waste material can be left on there. It is not necessary. It can be left on there. But in order to demonstrate the fold line as in the Berkowitz patent we will remove it so there will be no question about it as it is waste material. And there again I have the Berkowitz box. (Indicating by folding up flat box.)

I would like to indicate here certain ramifications of the making of this box that are inherent in all [193] boxes. As I said a little while ago, there is nothing in the law and there is nothing here that says that if I see I want to make a circle bigger,—a little larger or I want to make it square,—what is to prevent me from taking my scissors here and cutting it off like that. The patent says that they will lock when they come together and I can lock it with a square tab as well as I can that one there.

(Testimony of Virgil Blaine Chadwick.)

If we want to leave more material or less material, that is all right; it is part of your die-making art. It is part of anything we do,—whether it is buying clothes or eating,—just what you are doing to the taste which you have or the situation you have in hand. I notice in these boxes here that were presented to me by the plaintiff, he has taken the liberty to violate his own patent and make round corners and change them somewhat,—why? Because it is a better procedure. This box here is a better box than the Parks patent there because he has made improvements in it. He has added the round corners to it. You notice when I push this together here,—this is his own box,—I will demonstrate it for the counsel, too. When I push it together notice how the material buckles. If you want to round these corners you would have quite a time putting them together. So in normal construction, just [194] common sense,—if you give your five-year-old child scissors, and tell him to make improvements, he will do it and make it better.

These licensees over the country have found they can make improvements on that. We do the same here. I reserve the right to use common sense and judgment. I reserve the right for my men to use common sense and judgment in adapting patterns within the basic idea to what we are trying to accomplish. [195]

* * *

Mr. Smith: I would like to introduce in evi-

(Testimony of Virgil Blaine Chadwick.)

dence Defendant's Exhibit "14." Have you any objections?

Mr. Mellin: No.

(Defendant's Exhibit "14" received in evidence.)

Mr. Smith: I would like to point out that Exhibit "15," offered for identification became torn in the process of setting it up and was in the mind of the witness not acceptable and we furnished alternatively this which the Clerk has marked "16." We would like to offer that in evidence in lieu of Exhibit "15."

The Clerk: Do you want to withdraw "15"?

Mr. Smith: We will withdraw "15."

The Court: That is satisfactory.

(Carton marked as Defendant's Exhibit "16" for identification and received in [196] evidence.)

Mr. Smith: This concludes the examination of this witness for the defendant at this time.

V. B. CHADWICK

Cross-Examination (Resumed)

By Mr. Mellin:

Q. How long have you known of automatic boxes such as we have been discussing generally here, Mr. Chadwick?

A. Oh, since shortly after I came into the box-

(Testimony of Virgil Blaine Chadwick.)

making business,—probably three and a half or four years ago.

Q. Who was your predecessor in business?

A. Mr. Jim Norrie.

Q. Do you know whether or not he had a license under the Parks patent at one time?

A. I don't think he ever did. I believe at one time he negotiated for one but couldn't meet the financial requirements and dropped it at that point.

Q. How long have you known of the various boxes we have been discussing here made by various companies such as the Acme Folding Box and the Sanitary Box Company,—I mean of the locking bottom type?

A. Oh, I ran across them my first trip to the East, three and a half or four years ago.

Q. Then you knew those boxes generally were made under [197] licenses, didn't you?

A. Yes.

Q. And when you dealt with Mr. Hyndman you weren't under any misconception that there were outstanding prior patents in connection with automatic locking boxes?

A. Will you state that again?

Q. When you started to deal with Mr. Hyndman for this license you speak of, you had no thought that there wasn't any other outstanding and older patents than his?

A. No. I accepted the patent that was presented to me at its face value,—that it was a patent issued by the Patent Office.

(Testimony of Virgil Blaine Chadwick.)

Q. But you had knowledge that there were prior patents on locking bottom boxes,—automatics?

A. I knew there were some on the market. I didn't really investigate them until Mr. Hyndman introduced the thought to me. At that time we started checking through them, yes.

Q. At that time when you started checking through them did you find this Berkowitz patent?

A. I didn't check into them at that time. As I said before I accepted the patent of Mr. Hyndman as a valid patent. I did not make any search.

Q. Did Mr. Hyndman assure you at that time that if you [198] made a box according to what he said was his patent, that it would not infringe the Parks patent?

A. I don't think that he gave me any guarantee at all. The only guarantee he gave me was one written,—on the request of my attorney,—we inserted a clause there that in the event that my suit had to be defended that he would assume the responsibility for the same,—financially.

Q. In other words, when you started in to make this box you had anticipated that you would be sued for infringement of the patent?

A. No, it is a standard clause as you know in all patents. That is nothing out of line.

Q. Did Mr. Hyndman say to you that his box as given to you would do everything the Parks box would do?

A. He never mentioned the Parks box.

Q. Did he mention the Parks patent?

(Testimony of Virgil Blaine Chadwick.)

A. No.

Q. Did you know of it at that time?

A. No, I did not.

Q. Did you make any investigation?

A. No.

Q. You don't make any boxes having a blank formed as shown in this Figure 1 of Berkowitz do you, and formed such as you cut out with the scissors this morning? [199]

A. You say I don't make them?

Q. Yes.

A. I make them but they are glued a little differently,—like this. But your question is rather an obtuse question.

Q. I beg your pardon. I am sorry.

A. Sure.

Q. I mean you don't make them like this (indicating)?

A. I make them with the solid hinged line as you have seen introduced in evidence.

Q. Yes. And with the main panels,—the main locking panels fastened onto the sides of the box rather than the ends? A. That is right.

Q. So strictly speaking you don't follow the Berkowitz patent except, as you say, in function and so on?

A. I follow the principle of the Berkowitz patent. I follow that in principle just as closely as as probably your own licensees follow your Parks patent in principle.

(Testimony of Virgil Blaine Chadwick.)

Q. Let's get it. You don't make just two single bottom flaps like this, do you?

A. No. We allow the dust flaps to remain in there.

Q. You put the locking panels on the side panels of the box,—the wide side panels? [200]

A. We have put them both ways.

Q. But the box that you,——

A. This box that is in evidence; I think that is on the bottom panel, yes.

Q. But you at no time made a box strictly like this shown here as illustrated?

A. Certainly I have made it. I testified to that.

Q. How many did you make?

A. I made enough to satisfy myself that I had a legitimate patent,—that the patent that I had here had no legitimate foundation; that is what I meant to say. If you are trying to say if I made them commercially,—no. I made enough to satisfy myself that we had legitimate grounds, there.

Q. In other words, you made sort of experimental or test ones just exactly according to Berkowitz?

A. No, not all of them were exactly according to Berkowitz. If I made them exactly according to that panel they would all be square. We made them all shapes.

Q. I mean making the bottom exactly as shown in the Berkowitz?

A. No, there is nothing there that says that I have to make them that way. I made them accord-

(Testimony of Virgil Blaine Chadwick.)

ing to that and I made them other ways, also. We have made with square tabs, we have made them with round tabs, we have [201] made them with elongated tabs,—in several ways.

Q. How about commercially?

A. I testified we made none commercially.

Q. The only ones that you made commercially are like this that we have in evidence here?

A. No. We made other styles. We have made them with the flaps on the end panels as well.

Q. How many of this type have you made, the type that is alleged to infringe, here?

A. Oh, I would have to look at my records. I am under oath here. I would have to look at my records to know.

Q. I will let you make a guess, here. Was it in excess of one million boxes? A. No.

Mr. Smith: If your Honor please, the witness under oath has before this Court an exact statement as to what he has manufactured,—in boxes and the amounts in dollars of the particular types of boxes. To test his recollection there where the boxes he has spoken about as to certain sized dimensions,—and to test his recollection of this particular box doesn't seem to me to be necessary.

Mr. Mellin: If your Honor please, I just want an answer to the one question.

The Court: There is nothing before me; [202] merely a statement of Counsel.

Q. (By Mr. Mellin): May I call your attention to a paper which you signed under oath on the 6th

(Testimony of Virgil Blaine Chadwick.)

day of January, and ask you if that refreshes your recollection as to the number of boxes you made?

A. This has nothing to do with the question you asked me.

Q. I beg your pardon. I apologize.

A. If you will repeat your other question I think I can answer it intelligently.

Q. How many boxes made substantially in accordance with the one you are charged to infringe here have you made?

A. I will answer a different question than the one you asked me.

Q. I am sorry. I didn't understand that.

A. All right. I have made probably,—it looks like one million six hundred and forty-five,—oh, probably one million eight hundred thousand in quick mathematics; but not all of them were of the kind like the sample you had in your hand.

Q. If you make a box following Berkowitz which is oblong, you must change it to some degree mustn't you,—from the drawing. I realize your argument is that you have the liberty of making changes; I am not going to disregard that. I am going to ask you to confine your answers to the drawing itself,—just for that purpose. [203] So if you make that box oblong instead of perfectly square you must make some changes in the Berkowitz structure?

A. That is not a proper question to me because obviously the answer I would have to give you is no and that is not the facts of the case. Any time

(Testimony of Virgil Blaine Chadwick.)

you change the size or dimensions of a panel in any regard, the relating members to that also are changed in relationship to it.

Q. Just for the purpose of let's say for my record and my satisfaction. I would like an answer to the question.

A. I must refuse to give an answer to that question.

Q. I asked you this: If you make a box exactly in accordance with the Berkowitz disclosure in this drawing here and instead of making all of the panels of equal dimensions you make the end panels narrower than the side panels or vice versa, you must make a change in the construction of Berkowitz? Isn't that right?

A. Certainly. If you make extensions you must make the flaps to encompass that area, certainly.

Q. And you would have to make a change in respect to where it is bent in respect to the locking patents, isn't that true?

A. Not any more than in the Parks patent.

Q. You would have to make a change in the crease line? [204]

A. Certainly. We do that in all boxes.

Q. This morning when you were demonstrating boxes which you cut up and made them as you said like Berkowitz and got them to lock, you were doing something to the bottoms and distortion other than just pressing in on the corners, weren't you?

A. No, I was not.

(Testimony of Virgil Blaine Chadwick.)

Q. So you state if you make a box strictly in accordance with the Berkowitz patent,—

A. May I qualify my last answer. In the sample you handed me I had to put my fingers on it because you had mutilated the box beyond recognition.

Q. I am asking you about the others, the ones your Counsel gave you.

A. The answer is no. I kept my hands perfectly flat.

Q. And you didn't have to distort the box?

A. No more than normally.

Q. I wonder if you would mind cutting the tabs in this one so that they conform with Berkowitz, rounded at this end and coming to a line as shown in the Berkowitz drawing?

A. I don't believe I am under the necessity for doing that. As I said before, this is not a box that is made square like the Berkowitz patent. In good die-making, good processing you would be like your own die-maker in adapting the Parks patent to a square box, he would have [205] to make the alterations to do it. I will do that to the best of my ability.

Q. Will you make the line straight, as shown in the Berkowitz patent?

A. I am incapable of doing that. All I have here is a pair of scissors and a table. I will make it to the best of my ability.

Q. If you will do that; that is all I can ask of you.

A. Certainly (cuts triangular tabs from box bot-

(Testimony of Virgil Blaine Chadwick.)

tom with scissors). This is a lot more difficult than it looks, isn't it?

Q. I know it is difficult. I am sorry to have to ask you to do it, Mr. Chadwick.

A. You know you can start out with a blueprint and design one of these boxes and start from scratch with a pattern and make allowances for the various angles and what you have to work with.

Q. Is that correct now?

A. That is pretty much right.

Mr. Mellin: May I have this box marked for identification?

(Nalley's Potato Chip box marked in evidence as Plaintiffs' Exhibit "P" for identification.)

Mr. Mellin: I would like to offer it [206] in evidence.

(Plaintiffs' Exhibit "P" received in evidence.)

Q. (By Mr. Mellin): Am I doing this correctly, Mr. Chadwick?

A. No. Put your hands down at the bottom of the box. That is more nearly right, now.

Q. It doesn't work, does it?

A. Not right now, no. (Witness reaches for box.)

Q. I prefer that you not mutilate it, Mr. Chadwick.

The Court: I will ask that you hand it to him

(Testimony of Virgil Blaine Chadwick.)

and permit him to make any demonstration he wants to.

Mr. Mellin: Yes, sir.

A. If these lines are brought forth, here, and this tab right here,—if it is allowed to be extended a little further it extends a little farther and brings itself in.

Q. (By Mr. Mellin): I am not disputing that.

A. I did this very definitely for a reason because I know what you are driving at. In this Berkowitz patent you see down there you see a round corner,—see how that is rounded?

Q. That is right.

A. And the angle from here down to there is at a very [207] elongated angle. This box here,—because it is not square, you take your angle from here and give yourself a stronger angle than you would otherwise, in no way changing the patent or the claim of the box nor the reasons that the box is made.

This box here, if it comes in with the proper pressure, locks. And I didn't have any hands on the bottom of the box.

Q. Would you unlock it for me so it won't mutilate it?

A. Certainly. You notice you can't push it in unless you apply pressure on it (collapses box)?

Q. In other words, then, maybe it will work and maybe it won't?

A. That is exactly right,—in a hand-cut sample here. If we produce it from our shops we have

(Testimony of Virgil Blaine Chadwick.)

enough pride that the things we produce work; and we can make them work.

Q. Then you say that the thing that is important is to run this line "19"?

A. I am sorry. My glasses aren't that good. May I go down to the easel?

Q. Yes, you may. Line 19 must run from that point to here?

A. Line 19—is this 21 here?

Q. Yes. [208]

A. Line 19, line 21 and line 23 all have a very definite relationship to line 16. This line here has no number—in the variations of the box. If you take this box here and expand this out there so you have a wide panel here and two short panels here, naturally the lines have got to be compensated to allow for the increased distance you have made here. That is common in the trade because no two products are the same size. You have the same situation in the products developed under the Parks patent. You have the same situation in this here. As this product increases in height these lines and this diagonal here must all compensate for the increased distances that are involved.

Q. Thank you.

(Witness resumes the witness stand.)

Mr. Mellin: That is all.

(Testimony of Virgil Blaine Chadwick.)

Redirect Examination

By Mr. Smith:

Q. As a matter of slight compensation, Mr. Chadwick, with respect to the creased line "23" which is shown here as a dotted line, do we see such a compensation possibly in Defendant's Exhibit "14"?

A. Yes. These two lines right here are definitely the same crease line, here. You see them in the same [209] relationship on the box in the same manner.

Q. Would you care to state in your estimation what the angle is between line 16 and line 23?

A. Do you mean that is the bottom line?

Q. I am asking if you know what degree that angle is.

A. We vary that degree depending on the tightness of the lock that we wish and the product that it carries. It can vary—it is usually 45. We have made them 43 degrees and 47 degrees depending on the type of lock that we are involved in—whether we want a slip lock here or whether we want a lock that is forced in because it is going to carry additional weight.

Q. Within a degree or two, can you estimate what the angle is of this creased line to the bottom of the panel to which it is attached?

A. Well, it looks like this one here was made of—of course, this isn't my box and it is just con-

(Testimony of Virgil Blaine Chadwick.)

jecture on my part because I haven't got a protractor. But it looks to me like it is a 45° angle in order to bring a tight box. The gluing here is not perfect. When this box is brought up, do you see how much higher it is over here? When you look at the box like this it is definitely off of a 45. The intention may have been to have it at 45.

Q. It is close to a 45° angle? [210]

A. It is close to a 45.

Mr. Smith: Thank you. That is all.

Recross-Examination

By Mr. Mellin:

Q. If this fold line in Berkowitz is not approximately 45 degrees—that is this line 23D—you can't fold the box together flatwise, can you, assuming that the box is of an oblong type?

A. That is true in all boxes because when all folding boxes are made like this, any angle between must be approximately a 45° angle plus or minus a degree. That is true of the Beers style, the automatic Hyndman style, the Berkowitz, the Parks, because all boxes are essentially a flat pattern set over to a folded box. At some place along the line you have to come to a 45° angle.

Q. In all instances in the Berkowitz box this line must be a 45° angle?

A. I wouldn't say that.

Q. Within a degree or two?

(Testimony of Virgil Blaine Chadwick.)

A. I would assume that. But without definitely trying them out, I wouldn't know.

Mr. Mellin: Thank you.

Mr. Smith: You are excused, Mr. [211] Chadwick.

(Witness excused.)

Mr. Smith: Mr. West.

GEORGE WEST

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Smith:

Q. Will you state your name and your residence?

A. George West, 12752 6th N.W., Seattle.

Q. What is your occupation, Mr. West?

A. I am head of all of the gluing and folding at Coast Carton—the finishing department.

Q. That is what you call the finishing department. How long have you been the head of that department? A. Two and one-half years.

Q. Prior to that time what did you do?

A. I was installation engineer, erector and did experimental work for Staude Machinery Company.

Q. Is there any particular machine that you did experimental work upon?

A. Yes; the master gluer.

Q. We have had testimony there was a Staude

(Testimony of George West.)

Master Gluer; [212] is that what you are speaking about? A. That is right.

Q. On a Staude Master Gluer what operations are performed?

A. As a general rule it is the folding of collapsible boxes. I don't know how to be specific. It generally runs to collapsible bun trays, and generally boxes employ diagonals of 45° angles in their folds in order to collapse them and bring them out as a solid unit.

Q. What type of boxes have these 45° angles in their folding operation?

A. Automatic bun trays of Brightwood and Beers style and collapsible bottom boxes such as you have there.

Q. You are referring to Defendant's Exhibit "1," is that right? A. That is right.

Q. Would you explain to the jury what you must do to a blank as Exhibit "1" in making a folded carton of it?

A. First, feed the box in the machine and then time it with our timing chains.

Q. In connection with feeding it, in what direction does that blank travel?

A. It can be fed in either direction.

Q. Which way do you feed it?

A. Generally this particular box, we feed it with the [213] folds to the front end.

Q. In other words, from you toward me, is that right?

(Testimony of George West.)

A. That is right. In the first section our folders come up underneath and fold as a general rule the two center flaps. That is what it would be in this case. We make this fold and at the same time push that diagonal back so that that surface is exposed so we can put glue on it. In the same section we use another set of folders to fold this. Then we go into the second section and with the third set of folders do this (indicating), and at the same time perform this operation which is the same as we did in the first section. Then we leave our time sections, put the glue on, and make the fold with the belts just the same as is done in any straight-line gluer, and that is the finished box.

Q. The last operation is what?

A. To run it through the stacker and set the glue and dry them.

Q. This is Plaintiffs' Exhibit "K-1." Will you explain to the jury what it is?

A. Well, this box is fundamentally the same as the Nalley's box that I just had here except that for reasons of production we sometimes try to fasten them together or run them through the cutter in this fashion so that [214] we can make two boxes at once. The operation which I just showed on the front edge of the box is duplicated on the rear edge at the same time and in the same section of the machine; in other words, we do both operations going through the one section of the machine. Then the second section, we duplicate these two operations, and then we apply our glue and go into the

(Testimony of George West.)

standard gluing section and fold it right over. Then we come out with the box joined together—that is, two boxes.

Q. The operation then is the doing at one time of two foldings—which have been done in this case, but singly, is that right?

A. That is right. Well, that is the capacity of the machine a good deal.

Q. Do you gain any advantage by folding it as you have folded “K-1”?

A. Well, sometimes we do and sometimes we don’t. I would say ordinarily we don’t. We gain advantage on production with machine speed, but we usually don’t get the machine speed out of it. It is slower operation when it is double.

Q. It is a slower operation when it is double?

A. Yes.

Q. Are you familiar with the Himes patent that is here in [215] suit, number 2243421?

A. Yes, I believe so in a general way.

Q. This is Defendant’s Exhibit “2,” and if you have any doubt in your mind would you refresh your memory; are you familiar with that patent?

A. Yes. I have seen this.

Q. Have you read it?

A. I have read some parts of it, yes.

Q. Do you think you comprehended what you read?

A. Well, I believe so.

Q. Are you used to looking at drawings?

A. Yes.

Q. Could you understand the drawings?

(Testimony of George West.)

A. Oh, yes.

Q. Well, let's refer to the drawings—particularly to figure 1—and in looking at that drawing I wish with Exhibit “K-1” you would show the jury what you see in figure 1?

A. In figure 1 I merely see the blank laid out.

Q. A flat blank is what you see, is that right?

A. That is right, yes.

Mr. Smith: Would you mark this as an exhibit?
(Carton marked in evidence as Defendant's Exhibit “17” for identification.) [216]

Mr. Smith: Instead of using this one that has been folded, let's use this one.

Q. (By Mr. Smith): Now, will you explain what figure 1 in the drawing shows you?

A. It shows me the flat sheet as it is, here.

Q. What does that sheet consist of?

A. Well, it consists of two boxes nicked together; it would be two boxes with a patent locking bottom nicked together.

Q. What do you mean by “nicked together”?

A. To facilitate running through the gluer and also in the cutting, these cuts that separate the two boxes are not complete. We have left little bits of stock in there to hold them together.

Q. How is that left in there?

A. On the cutting press they nick the knives so that the knife doesn't cut.

Q. In figure 2 of the drawing—I want you to look at it carefully—and will you tell us what you

(Testimony of George West.)

see there, and if possible show for the benefit of all of us on the blank that is before you?

A. The four diagonal flaps have been turned under the sheet—under the blank—in that manner (indicating by folding flaps).

Q. What tells you that they have been turned under? [217]

A. I can see them shown by a dotted line. That shows that they are underneath—that they are concealed.

Q. They are concealed from your view, then?

A. That is right.

Q. Now then, referring to figure 3, will you then tell us and demonstrate what you see in the drawing and try to show us with the model?

A. These panels have been brought up in this fashion (indicating by folding) all along this score in both boxes. The glue has been applied and it is ready for gluing. It shows the glue applied—well, they apply it not on the panel with the 45 but on the opposite.

Q. Do you see any difference in what you have just done to Exhibit “17” and what you did a few moments ago to Exhibit “K-1” in explaining how you operate the folding machine?

A. Well, the type of equipment we have doesn’t operate in that fashion.

Q. In what fashion?

A. In the fashion shown here, folding this down and then bringing these up (indicating by folding). This is all one operation, here, to bring that up

(Testimony of George West.)

and bring this back and down at the same time.

Q. What brings that flap back and down at the same time?

A. As the folder finger raises it, it passes by a diagonal [218] bar. And as it progresses through the machine, this bar gradually flattens down until it is flat with the work line—it pushes the stock down.

Q. Have you read Claim 1 of the Himes patent?

A. Yes, I have.

Q. Do you find that that teaches—what does that teach?

A. Would you mind if I just take a quick look through here?

Q. Not at all.

A. I am not too sharp on this legal part (witness reads to himself).

That merely describes the two blanks being nicked together and the method of folding, as I showed when I first had this blank—folding this under and then bringing it up in this manner.

Q. Is there some language in that claim 1 which confirms what you have just said?

A. Yes, there is.

Q. Would you care to read it out loud, please?

A. "Said method comprising folding said extensions on the lower faces of sections to which they are respectively joined, folding the respective bottom sections flat upon the upper faces of their connected walls respectively, thereby to upwardly expose the flap extensions."

(Testimony of George West.)

I skipped something here which told about the flap [219] extensions being folded down, first. But that describes this operation—"thereby to upwardly expose the flap extensions folding each extension at the end of the series upon the assembly adjacent thereto to cause said flaps extensions to engage respective cooperating areas of the adjacent assembly respectively adhering said flap extensions to said areas and adhesively hingedly connecting the free end edges of the series." That is the final fold in the gluer section.

Q. And to get from the flat condition to the finished condition, with the bottom flaps folded over, how many steps are performed according to that language? A. There would be two.

Q. Are you familiar with double blanking as it has been practiced in the box business?

A. Yes, I have seen it before.

Q. Can you tell us what is double blanking?

A. Well, to me it is a method of getting production within the limits of the machine.

Q. Does it give particular advantage of some kind?

A. It gives you some advantage in speed. You are limited by the size of your machine, by its capacity, and when the blank gets too long naturally you can't get the number of boxes per foot of machine travel. When the blank is about thirteen inches you can run two blanks [220] to the one revolution of the feed wheel; when the blank gets

(Testimony of George West.)

over that, you can only run just one blank to every twenty-six or twenty-eight inches, the feed wheel itself being thirty inches in diameter.

Q. Does that Exhibit "17" before you show us double blanking? A. Yes.

Q. Could you hold it up and point out to the jury what you mean by double blanking?

A. Well, it is actually two boxes. This box, when it is all folded up, can be torn apart by the customer and he will have two complete boxes, there, because actually these are both bottoms (indicating). His method is to rip that apart and get two complete boxes out of it. Our reason for doing it is to do it in one operation.

Q. Will you turn the model over, please, so that the white side is exposed?

A. (Witness complies.)

Q. With this red pencil, could you trace out the outline between the two boxes?

A. (Witness complies and draws on cardboard blank.)

Q. Will you hold it up? I guess we will have to ask you to lay it down again. I am pointing here to an element and ask you to mark it with the letter "A" so we can refer to it; tell us what is that part right there? [221]

A. That is the lid.

Q. That is the lid? A. Yes.

Q. And right along here is a long narrow piece; we will mark that "A-1."

A. That is the tuck.

(Testimony of George West.)

Q. What is the tuck?

A. Well, it is the front part of the lid that tucks down into the box for closing.

Q. Would you call it a "tuck flap"?

A. A tuck flap.

Q. Yes. I point to an adjoining part, here, and ask you to mark that "B." What is that element?

A. That is a dust flap. That is a term which we use for it—"dust flap." I believe it is general.

Q. And I point over here at the end to an element and ask you to mark that with the letter "C"; what is that?

A. That is also a dust flap.

Q. On what box or in connection with what box?

A. That is on this box "A"—the lid "A."

Q. The one with the lid "A"?

A. That is right.

Q. Do you find a dust flap opposite the flap "C"?

A. Yes. [222]

Q. Will you mark that with a double "C"?

A. (Witness complies.)

Q. Do you find a dust flap opposite the flap "B"?

A. Yes.

Q. Will you mark that double "B"?

A. (Witness complies.)

Q. And do you find another lid?

A. That is right there.

Q. Will you just mark that double "A"?

A. (Witness complies.)

Q. Does that also have a tuck flap?

A. Yes, it does.

Q. Will you mark that double "A-1"?

(Testimony of George West.)

A. (Witness complies.)

Q. Can you indicate that on the box that has the lid "A"—"Walls" mark them 1, 2, 3 and 4, please.

A. (Witness complies.)

Q. The box that has the double "A," will you mark the walls with the numerals 5, 6, 7 and 8, please?

A. (Witness complies.)

Q. Do you find any originality in all of the elements which you have marked with a pencil here?

A. No.

Q. How long have you known of such a structure as that?

A. I have seen that a good many times. I would say I [223] have seen that probably since I worked at Staude's—work of this type.

Q. For many years?

A. Oh, ten or twelve years.

Mr. Smith: Would you mark that as Exhibit "18," please?

(Carton marked as Defendant's Exhibit "18" for identification.)

Q. (By Mr. Smith): I am handing you Defendant's Exhibit "18" and ask you if there is any similarity between Exhibit "18" and the blank which you have just marked up, Exhibit "17"?

A. Well, the similarity that it is two boxes nicked together. It is a different type of box.

Q. Can you with our Clerk's red pencil mark a line that would indicate the differences between the two boxes?

(Testimony of George West.)

A. (Witness draws on blank, Exhibit "18.")

Q. Would you hold that up, please?

A. (Witness holds up box and exhibits same to jury.)

Q. To the right is one box and to the left is another, is that right? A. Yes.

Q. Does each box have a lid? A. Yes.

Q. Does each lid have a tuck flap? [224]

A. Yes.

Q. Are there dust flaps on each box?

A. Yes.

Q. Identical to each other? A. Yes.

Q. Without taking the time to mark all of these parts, could you assure us that you could give the same letter and numeral designation as is on Exhibit "17" on Exhibit "18"?

A. Yes. That part of the structure is identical.

Q. You say it is nicked together. Can you show the jury what you mean? Some part there might show what you are talking about.

A. Do you mean the nicking?

Q. Yes.

A. Well, the nicking is done—I see some here and some up here (indicating).

Q. I notice that at one end, here, the parts seem to be quite loose. Is that because there is no nicking?

A. That is the reason that it is loose. The nicking in this case is to hold the scrap on the box. It is to hold the box together. That is probably a little

(Testimony of George West.)

bit different function than this but that is what it is—to keep it from getting all messed up when you handle it. [225]

Q. What do you mean by the scrap?

A. That is this stock.

Q. It is thrown away?

A. Not all of the time; sometimes, yes.

Q. If it is large, you rework it, is that it?

A. Yes.

Mr. Smith: That is all.

Cross-Examination

By Mr. Mellin:

Q. Mr. West, with respect to the blank that you have just been speaking of, the green one, that is 2 single boxes, isn't it? A. Yes, it is.

Q. And for the purpose of—that is, a double die cutting them out and then when it comes out of that machine they are separated into single boxes, are they not?

A. Yes, that is what ordinarily is done.

Q. It is not a double box blank in the sense of making two boxes and gluing them and making them at the same time?

A. I would say no in this case.

Q. With respect to the folding operations you were discussing—these (indicating) as I understood you—and correct me if I am wrong—as I understand it, you say the [226] only difference—and I don't want to put any words in your mouth, I truly mean that—the difference as I understand it is

(Testimony of George West.)

that in the patent it requires that this be bent under to here and then that this be bent that way?

A. That is right. I will turn the blank over.

Q. Is this to be bent here?

A. That is right.

Q. And then this over this way?

A. That is right.

Q. The way the Staude Master Gluer does it is to bring these over at the same time and bend it like that? A. That is right.

Q. That is the only difference, is that correct? Take your time and look at the patent.

A. Well, for that specific operation.

Q. Are there any other differences; you found all of the other elements of the claim, didn't you?

A. I believe so; if you will just give me a second.

Q. Yes, go ahead; take your time, Mr. West. I want you to be certain that you are right.

A. Yes, I believe so. That is the fundamental difference.

Q. In other words—just so that I haven't misunderstood you, you say in the patent requires this to be bent on this surface and then "that a [227] way"? A. That is right.

Q. And the way the defendant does it and the Staude Master Gluer is "that a way"?

A. In one continuous operation.

Q. Sort of in one continuous operation?

A. Yes.

(Testimony of George West.)

Mr. Mellin: That is all.

Mr. Smith: You are excused.

(Witness excused.)

Mr. Smith: Mr. Orland Christensen, please.

At this time we will offer Exhibits "17" and "18" in evidence. Do you have any objection?

Mr. Mellin: No.

(Exhibits "17" and "18" received in evidence.) [228]

ORLAND S. CHRISTENSEN

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Smith:

Q. Will you state your name, please?

A. Orland S. Christensen.

Q. Where do you reside, Mr. Christensen?

A. 20203 Greenwood Avenue, Seattle.

Q. What is your work?

A. I am a patent attorney.

Q. In Seattle? A. In Seattle.

Q. What qualifications do you have to say that you are a patent attorney?

A. I am a graduate engineer; I am registered to practice in the United States Patent Office. I

(Testimony of Orland S. Christensen.)

am a member of the Bar of the State of Washington and of this Court.

Q. How did you prepare yourself for that work? A. You mean——

Q. What studies did you carry out; where did you study?

A. My engineering studies were in the University of Washington, here in Seattle. Following that, I was a staff member of Radiation Laboratory, Massachusetts [229] Institute of Technology, for four and a half years, during which time I studied patent law and took the examinations to practice before the United States Patent Office and passed it. That was in 1944. I commenced studying law in the evenings while I was a member of Radiation Laboratory. Following termination of membership there, I spent a year in the United Shoe Machinery Corporation in Boston in their patent department as an associate of that department. And then practicing before the Patent Office all of that time with the United Shoe Machinery and dealing with inventions and patent matters during a major portion of my stay at Radiation Laboratory. The work there involved radar inventions primarily and related patent inventions. And that United Shoe Machinery Corporation related to shoe machinery, of course.

In 1947 I came to Seattle at the invitation of Reynolds and Beach, a firm of patent attorneys, and became associated with them. Then I finished my law training at the University of Washington

(Testimony of Orland S. Christensen.)

Law School and passed the Bar examinations in 1949 and became admitted in the same year to the Bar of this State. In the same year, also, I was admitted as a partner in the firm—full partner.

Q. I think you neglected to say that you were studying— [230] how or where you were studying law during your time at M.I.T.?

A. I studied law back in Boston, in Northern University Law School over a period of two and a half year because I was doing it on a part-time basis. I was a full-time employee during that period. But I studied full time in Seattle at the University of Washington—that is, on a few credit basis, and worked as a regular patent agent until I became admitted to the Bar, that is, with Reynolds and Beach until 1949 and since as a patent attorney.

Q. How many years would you say you have done work in the patent business, officially?

A. Since 1947 I have worked in a private practicing firm of patent attorneys. For a year with United Shoe Machinery my sole work and responsibility was in connection with patent matters, obtaining patents, filing patent applications and prosecuting them. Before that at Radiation Laboratory I was not so much engaged in practice before the patent office myself, directly, as I was associated and working with people who were. Our function was mainly to satisfy the contract between Radiation Laboratory, M.I.T., and the Office of Sci-

(Testimony of Orland S. Christensen.)

entific Research and Development, which was to disclose inventions made at Radiation [231] Laboratory to the Government for the dissemination of information as well as the Government's patent purposes. I worked hand in hand with sections of the Army and sections of the Navy patent departments in seeing that the Government's patent protection was looked after.

Q. Does your work and has your work involved consideration of matters of validity of patents?

A. Yes. Not infrequently a client would come in with a question as to the validity of a patent and we would pass upon validity.

Q. Do you pass upon questions of patentability?

A. Yes, we do that very regularly.

Q. Does the word "anticipation" mean anything to you?

A. The word anticipation refers to the question of whether a disclosure in the prior art constitutes the substance of some subject matter under examination, in the patent sense. In other words, it means that if the prior art—that is, the knowledge available to the public, let us say, before the invention in question—if that knowledge was there, then the invention in question is anticipated, and it is therefore not patentable because it is anticipated. Somebody came before and anticipated the inventor. In deciding the question of anticipation you are simply deciding whether something in the prior art done by somebody else before [232] and available is in essence the substance of what you

(Testimony of Orland S. Christensen.)

had before you upon which you are trying to decide whether there is a patentable invention.

Q. You have been, as I understand it, talking merely about a submitted idea, is that right?

A. Yes.

Q. Assume that that idea is embodied in a patent, can there be anticipation in that case?

Mr. Mellin: If your Honor please, if he is qualified now I would like to ask a question or two on voir dire.

The Court: You may do that, Mr. Mellin.

Examination on Voir Dire

By Mr. Mellin:

Q. What do you know about paper box making except what you studied for this trial?

A. I do not know a great deal, Mr. Mellin. I have had occasional matters come up in paper box making but I am not specialized in that field.

Q. What matters came up in paper box making, particularly automatic boxes or these boxes we have been talking about?

A. I will be perfectly frank. I don't remember the details of the cases involved. I do know that a couple [233] of years ago I worked with a patent application which resulted in a patent, as I recall, on a folding box. I don't remember whether it was an automatic folding box or not.

Q. Did you have any practical experience in a paper box factory?

A. No, I never have.

(Testimony of Orland S. Christensen.)

Q. Really, then, the only knowledge you have of these paper boxes is what you gained since you were retained to testify at this trial?

A. The only knowledge with respect to these particular boxes, that is true. As I say, I have had occasion—very infrequent—to deal with boxes before. [234]

* * *

Direct Examination
(Resumed)

By Mr. Smith:

Q. Mr. Christensen, are you aware of the issue in this case? A. Yes.

Q. Do you understand that the issue with respect to the Parks patent is limited to the validity of claims 2 and 5? A. Yes, I believe I do.

Q. Have you studied the Parks patent?

A. Yes, I have.

Q. Have you read it from end to end?

A. Yes.

Q. And reread it and studied it, is that what you mean? A. Yes.

Q. And you have read claim 2?

A. Yes. I have read claim 2 and studied it very carefully.

Q. And you have read claim 5? A. Yes.

Q. Have you studied it? A. Yes.

Q. Are you familiar with the history of the application that lead to that patent while it was in the Patent Office? [240] A. Yes.

(Testimony of Orland S. Christensen.)

Q. I hand you Plaintiffs' Exhibit "B" and ask you if you can tell us what that is?

A. It is a certified copy from the Patent Office of its official file wrapper and contents, pertaining to the Parks patent. This is the complete record of the Patent Office with respect to the application by Parks which ultimately resulted in the Parks patent, including the correspondence between the attorneys prosecuting the application, and the correspondence from the examiner in the Patent Office who decides upon whether or not a patent should issue, and if so what it should contain.

Q. How is a matter of a patent application gotten before an examiner?

A. The patent application is filed in the Patent Office and—depending upon its subject matter, it is assigned to one of the divisions in the Patent Office. There would be a division which would handle the box making art, and in that division it would go to an individual examiner, called the primary examiner, who would in due course study the application and pass upon it.

Q. What type of men are primary examiners?

A. Well, they vary considerably as to background and experience. Many of them are old-time government employees—civil service employees—who have made [241] a career of patent examining. On the other hand, there is the extreme to the other side—younger men who are interested in the patent profession who are getting their training in the Patent Office. Frequently they study law school

(Testimony of Orland S. Christensen.)

at George Washington University. Very often they have had engineering degrees but not necessarily so. As I say, they vary all of the way in between there. It is hard to classify them.

Q. When the application arrives before the examiner, what is normally the next important thing that takes place?

A. Well, his task is to read the application over and find out what the applicant is claiming as his invention for which he seeks a patent; and after he understands what the invention is that is claimed in the application, he next has to decide whether or not that invention is new, and secondarily whether if it is new, if it is patentable.

After he has read the application to familiarize himself with the subject matter, he conducts a search through the records of the Patent Office in order to unearth any pertinent prior art disclosures, and that search will ordinarily extend to all previous United States patents in this particular class, and usually foreign patents. It may sometimes go into other [242] publications such as trade journals and so on.

Q. When he has made that search, what does he next do?

A. After he has completed his search, his next task is to inform the applicant of his decision initially as to whether or not the claims in the application—the numbered paragraphs at the end of the specifications—distinguished from the prior

(Testimony of Orland S. Christensen.)

art in a sense which is—in the patentable sense I should say—whether each of them defines an invention over and above and beyond the prior art. Because it is his task on behalf of the people of the Government to be certain that patents are not issued for things which already in the public domain—public knowledge—and therefore it is his task to require that the inventor, the applicant, limit his claims, the language of them, so that he does not trespass upon public domain property which would be the prior art. He has to decide, and he informs the applicant as to whether the prior art constitutes an anticipation, as I defined that word, of each and every claim in that application. Does that answer the question?

Q. This Exhibit “B,” which is before you, can you show the jury how much of that constitutes this application that apparently was filed in that case?

A. Yes. In this case the application consists in nine [243] full pages of specifications—this is as filed originally in the Patent Office—and eight claims. They are expressed over five pages. It consists of appealing to the Commissioner to grant a patent, in addition, and an oath by the inventor swearing that the invention is new to the best of his knowledge and belief and he does not believe it was known before his invention and so on, and other statutory provisions of an oath. In total eighteen pages.

Q. Is there anything else?

(Testimony of Orland S. Christensen.)

A. Oh, yes, and the drawings.

Q. Would you hold up the drawing, please?

(Witness holds up drawing to show the jury.)

Q. (By Mr. Smith): Does that drawing have any similarity to Defendant's Exhibit "11"?

A. Yes. It is the same drawing. The drawing of an application is made upon Bristol board or heavy paper, and it is used ultimately in printing the patent, by a photo-lithograph process. It is transferred from the drawing as filed into the patent drawings.

Q. I believe you mentioned, after this search and this consideration had taken place, that the examiner writes a letter or calls this matter to the attention of the applicant. Do you find such a happening in that file? [244]

A. Yes. These papers are arranged chronologically. Here is the letter which is from the Patent Office. Would you like to have me state what is in there?

Q. Yes; if you would read what the subject of the letter is. It is short.

A. It is addressed to the attorneys of the applicant. At the heading of the letter there is a statement of the references relied on in this action—the action being the examiner's initial action in the case. Then by references he means citations to particular prior art. In this case they are all prior patents. One is a Cramer patent 1662698; the second is a Filmer patent, a British patent, 345682; the

(Testimony of Orland S. Christensen.)

third is Creasey patent 1679710. And the fourth is Berkowitz patent, number 1700733—all United States patents except the Filmer patent. Their dates in the order in which I named them are March 13, 1928; April 2, 1931; August 7, 1928; and February 5, 1929.

Following the listing of the prior patents relied upon by the examiner, is a statement of what the examiner—what his position is with respect to the individual claims in the application. He states that claims 1, 2, 5, 6 and 7 are rejected as being obviously fully met in Cramer; in other words, he says, in effect, that the Cramer reference—the Cramer [245] patent constitutes an anticipation in his opinion of these particular claims.

Secondly, he covers the remaining three claims—3, 4, and 8, stating that they appear to be allowable.

Q. What do you mean by allowable?

A. He means by allowable that his position at the time of this action and letter is that he finds nothing in the prior art which he is relying upon which would prevent these claims from ultimately passing—from ultimately being incorporated in the patent if and when it issues.

Q. Is he, by listing that Berkowitz patent, relying upon the teaching of Berkowitz?

Mr. Mellin: If your Honor please, I object to that—as to what the examiner was doing with it.

The Court: Sustained.

Mr. Mellin: Unless he was there.

Q. (By Mr. Smith): In connection with a re-

(Testimony of Orland S. Christensen.)

jection of the rejected claims, is the word or name "Berkowitz" used at all?

A. The name Berkowitz is cited, as I mentioned in this list, at the head of the first Patent Office letter. I do not recall that it was referred to other than that. I do not believe it was.

Q. Referred to other than where?

A. In the file wrapper. [246]

Q. There is no reference to it at all, is that right?

A. That is my recollection. I am just going through this to be sure. No, I find none. I found none, as I recall.

(Recess.)

Q. (By Mr. Smith): Mr. Christensen, in your testimony a little while ago, you mentioned it was the examiner's duty to consider from the material found in his search the question of anticipation, as to whether or not a claim is or not anticipated, is that right? A. Yes.

Q. How does he determine that question of anticipation?

A. With reference to a particular prior art disclosure, do you mean?

Q. Yes, sir; could you tell us the technique of it?

A. Well, as I say, he has studied the particular claim on which he is focusing his attention, and he knows what the elements of that claim are; that is, if it is a claim to a combination he knows what all of the elements of that claim may be. He com-

(Testimony of Orland S. Christensen.)

parens that claim with its various elements, with the disclosures in the prior art patent or publication or whatever the particular prior art may be, to see if he can find in that prior [247] art the same or equivalent elements. And if he can, then it is a clear anticipation. The extreme case is where the prior art will be a virtual picture of the thing which is being claimed. Then shading off from that there will be questions of whether or not though there will be a difference, whether that difference is significant in the patent sense—whether the difference which makes this claim now a little bit different or maybe greatly different from the prior art is a significantly patentable difference, which means, in other words, is it an invention over and above that prior art. You have to look at the entire claim, and each claim is considered separately, and you have to find whether all of the elements are present in that prior art. If they are, they belong to the public assuming that the patent has expired and everybody can use the disclosure of the patent. If it is in public knowledge then of course it is not patentable and the examiner rejects the claims as being anticipated, or the particular claim.

Q. What is prior art?

A. What is prior art? Prior art is available knowledge—what has gone before the inventor. Usually the prior art is that which is found in printed publications, patents, trade journals, professional journals and so on. [248]

(Testimony of Orland S. Christensen.)

If an inventor can show to the Patent Office that he comes—in point of time—earlier than the invention of another, we will say, whose invention is supposed to be an anticipation, there is a proceeding by which he can show that; and despite the fact that the reference or prior art referred to has an earlier date of publication than the date we will say that the applicant has filed his application, if he can show that he is earlier, then that prior art is not prior art in the sense that it would bar him from getting a patent because he is in fact the first inventor. But the list of prior art which they cite—they are prior art to the applicant if they bear a date.

The Court: This isn't pertinent to our case, is it?

The Witness: I am probably getting a little afield.

Mr. Smith: It is explanatory, your Honor.

The Court: Well, it is of no value to us in this case.

Q. (By Mr. Smith): Have you read claims 2 and 5 thoroughly and do you think you understand them? A. Of the Parks patent?

Q. Of the Parks patent, yes. [249]

A. Yes.

Q. Have you read and studied the Berkowitz patent? A. Yes, I have.

Q. Is that a copy of it that you have before you?

A. This is a copy which I have. It has been colored for convenience in following the description.

(Testimony of Orland S. Christensen.)

Q. Is this Exhibit "12" an enlargement of that drawing which you have colored?

A. Yes, it appears to be.

Q. Is there an invention recited—I beg your pardon. Is there a combination of elements recited in claim 2 and claim 5 of the Parks patent?

A. Yes. There is a combination including a number of elements in each of those claims.

Q. How many elements?

A. Would you like me to count them?

Q. Yes, sir.

A. Well, this I haven't done. It starts out and says, "A folding carton," which is an introductory statement defining what the combination is in general, "comprising a plurality of side walls." Well, right there you have an open question as to how many elements would be included; it might be four.

Q. What does the word "plurality" mean?

A. It means more than one, and there are four shown in the [250] patent, itself, on the drawing of the patent. "A plurality of side walls hingedly connected in rectangular formation." Well, that means four—I should have read it all the way through. "And a bottom wall"—which constitutes a fifth element, but it says further, "formed of two identically similar sections." Which breaks that fifth element down into two sub-elements or sections as they refer to it, and makes a total of six, "each section being composed of two elements hingedly connected," and so on. Well, each of those

(Testimony of Orland S. Christensen.)

sections then has two elements which adds two to our total which makes eight. "Hingedly connected to the lower edges of two adjacent side walls, the two elements of each section being permanently connected and being creased on a line permitting folding thereof to correspond to the folding of the associated side walls." Well, that doesn't recite additional elements but qualifies the relationship of those elements. "The bottom sections being provided with inter-engaging locking means." Now, those are additional elements which are tacked on to the bottom sections but I suppose you should say strictly that this would bring it up to ten elements.

Q. Why do you say ten?

A. Well, the bottom sections are provided with something—when somebody is provided with something it means [251] that something is added. I think here you would say that the inter-locking means are added to the bottom sections.

Q. One to each section?

A. Or they may include it. You can look at it either way. But for the purpose of the elements of the claim, I would consider that the inter-engaging locking means are separate claim elements. "Provided with inter-engaging locking means comprising on each section a lug." It explains what the means are. "A lug projecting from substantially one-half of its free margin"—that is the free margin of the bottom section, "said lugs being staggered with

(Testimony of Orland S. Christensen.)

relation to each other when said bottom wall is closed"—explains the relationship of the lugs. "The connection of said bottom elements to each other and to the side walls affording a positive means for moving the bottom sections toward position for closing said bottom wall and for engaging said locking mean." All explanatory of the relationship between the elements.

Well, did I get ten? I believe I added up to ten. Yes, we have added them up.

Q. You included the last two lugs, I believe. Then in considering whether or not that claim is anticipated, what would an examiner do? [252]

A. Well, he would take what he then considered to be the prior patent which came nearest to it, and he would compare the elements of the claim in their stated relationship with what he considered to be corresponding elements in that prior patent or other publication. [253]

* * *

Q. (By Mr. Smith): Referring to claim 5, will you tell us how many elements you find there; tell us why we can have two claims in a patent?

A. Why can we or why can't we?

Q. Yes, why can't we have one and then another?

A. Well, the purpose of the claims is to define what the patent in reality covers—what the grant of the Government to the inventor is. If a patent, for example, has one single claim—let's suppose—which claim lists certain elements—and it is very

(Testimony of Orland S. Christensen.)

specific as to what each of those elements is in the device which is shown in the patent—then that claim will define what that patent covers; specifically as the term is used in the claims that are employed.

If the inventor feels that besides having something that is valuable in that specific form of his idea, he has also a fundamental principle in his device which would have different forms beyond the form which his drawings show, and beyond the form which that one claim which I mentioned showed, then he would like to cover that principle more broadly to protect himself and thereby to extend the coverage of his patent, and so he would add another claim which would be more general maybe at one or more points in its recitation [254] of elements, so that the broad principles were covered or the relationship of certain elements were covered broadly. So it might be that any number of claims which—defining inventions in different degrees of breadth or specifcness or species it—I don't know which it is—would be included in the one patent. The purpose of it is that if it turns out that one claim is invalid, say a broad claim, because it happens to recite something so broadly that it overlaps prior art, and is met by the prior art, and the Court so holds, then the other claim might still stand because it is more specific.

Q. Very well. Will you read or count the elements of claim 5, please, as to number?

(Testimony of Orland S. Christensen.)

A. I can do it by comparison with claim 2, perhaps, more quickly. Well, claim 5 starts off and calls for a polygonal enclosure. It says, "A plural amount of side walls hingedly connected at their edges to form a polygonal enclosure." This claim differentiates from Claim 2 in that it says polygonal instead of rectangular. Well a rectangle is a special form of polygon. A polygon could be anything three sides or more. Therefore the number of elements at that point is indefinite and it is hard to say what you should assign as the number of elements to that particular phrase in the claim, in other words, how many side walls is not stated specifically. It just says polygon. [255]

Q. In each instance it is a group of elements, though, is that not right? A. Yes.

Q. In this instance, claim 5, there could be four elements to form a polygon, is that correct?

A. That is quite true.

Q. All right. Let's assume four, if you will, please?

A. All right. Assuming four—"and a bottom wall formed in a plurality of sections" and there again it does not say how many. It says "plurality which could be two or more. So if we were going to say that it was in one instance the number of sections in the drawing of the patent, it would be two to be specific, therefore a total of six elements so far. "Each section being hingedly connected at two edges to the bottom edges of the two adjacent side walls and being creased for folding on a line

(Testimony of Orland S. Christensen.)

extending across the section from a point adjacent the hinged connection between the two side walls to which said section is connected, whereby said section may be folded into planes parallel with said side walls when the carton is collapsed"—still six elements—"the free margins of said sections being formed with similarly shaped inter-locking means." Well, at this point the language is a little different than in the other claims. The other claim said "the [256] bottom sections being provided with inter-engaging locking means," and this claim says, "the free margins of said sections being formed with similarly shaped inter-locking means." I would say that I would still consider those two separate elements, and therefore I would find that that increased the total to eight, if my assumption that two bottom sections is meant in a particular case. "The free margins of said sections being formed with similarly shaped inter-locking means adapted to be inter-engaged for holding the carton in an extended position, the inter-locking means of each free margin comprising a lug extending along one-half of said margin"—well, the lug is—the recitation of a lug and its position is merely a specification of what the inter-locking means are or is, in the singular—"and adapted to overlap the unlugged half of the margin of the next section, the bottom sections being automatically moved into position for engagement of the inter-locking means when the side walls are extended to the normal

(Testimony of Orland S. Christensen.)

open position." Today I can't count very good—that is right—there should be ten. Assuming four side walls, there is four. The bottom wall, the two sections, that is six, and then if each of the sections is subdivided into two, that makes eight. Then, as I said, I considered the lugs or the inter-locking means as two more which [257] makes ten, as in Claim 2.

Q. There are ten elements?

A. I would consider it that, yes.

Q. Slight differences in the language?

A. Yes; there are some differences in the language between the claims.

Q. Which of the two would you say is the broader?

Mr. Mellin: If your Honor please, I think that is a question of law.

The Court: Overruled.

Mr. Smith: I beg your pardon?

The Witness: He said overruled.

A. Well, with reference to the statement of a polygonal enclosure as distinguished in claim 5, as compared with a rectangular enclosure in claim 2, I would say that claim 5 is broader because it would cover any device which had three sides or more in its enclosure. With reference to the bottom wall being formed of a plurality of sections in claim 5, I would say—and claim 2 by comparison, the statement is that the bottom wall is formed of two sections—I would say that claim 5 would be broader because the number of sections is not stated and

(Testimony of Orland S. Christensen.)

the claim would therefore cover any box which had a bottom, we will say, within the other parts of the claim, which had a bottom having two or more sections. [258] The “or more” part of it makes claim 5 broader than claim 2 in the coverage of the patent, as to claim 5. However, there is a little difference in the language when talking—speaking of the lug. In claim 5 it says that each lug extends along one-half of the free margin of the bottom sections; whereas in claim 2 it says “substantially one-half.” I don’t know that I can say that is a great difference and yet there is a little difference there in the wording. One-half is more specific—you would ordinarily say it was—than substantially one-half. Because substantially could be something—depending upon the case—could be somewhat different than actually an accurate one-half.

By and large I would say that claim 5 is broader than claim 2 because these other limitations seem to me to be more essential limitations.

Q. Have you read the Berkowitz patent?

A. The Berkowitz patent referred to in the examiner’s first letter—yes, I have.

Q. Have you read and studied the drawing of the Berkowitz patent? A. Yes, I have.

Q. Have you read the language of claims 2 and 5, having in view the drawing of the Berkowitz patent? [259] A. Yes.

Q. What did you find?

Mr. Mellin: If your Honor please, this goes

(Testimony of Orland S. Christensen.)

precisely to the point; on the further ground it is argument and on the fourth ground that is deciding the precise issue of the case.

The Court: It is not specific enough. "What did you find." It is too general a question. I am unable to rule on the objection. Be specific. In what respect what did you find?

Q. (By Mr. Smith): Did you find any structural similarity between what you found in the claims 2 and 5 and in the drawing of Berkowitz?

A. Yes, I did.

Q. Would you say it was substantial similarity?

Mr. Mellin: I renew my objection, your Honor. We are now having the witness argue the application of the written claims to the structure which were described which is the function of the jury.

(Last question read by Reporter.)

A. Yes. I would say there is no question in my mind but what they are virtually identical—claims 2 and 5, now, with reference to the Berkowitz disclosure.

Q. (By Mr. Smith): Have you read the Himes patent in suit? A. Yes, I have. [260]

Q. Do you have a copy of it? A. Yes.

Q. Have you studied the drawing?

A. Yes, I have.

Q. Have you examined claim 1 thereof?

A. Yes.

Q. Do you feel that you have rather a familiar-

(Testimony of Orland S. Christensen.)

ity with the structure that is described and claimed as shown? A. Claim 1 is a method claim.

Q. Yes. What is a method claim?

A. Well, a method claim is a claim permitted by the Patent Statutes in which the patent covers a process or method as distinguished from a device or substance. It is a different class of invention than an apparatus invention; and therefore the claim being to the invention would be directed to the steps of a process rather than to the elements of an apparatus—a mechanism.

Q. With reference to the Parks claims 2 and 5, are they defining a method?

A. Claims 2 and 5 of the Parks patent devise a box, an apparatus or device.

Q. It is a finished box—that is the language, is it not?

A. Yes, it is a finished box. It says a folding carton. Whereas claim 1 of the Himes patent is a method claim [261] which defines the steps of this method which they are claiming as the invention and which the patent is intended to cover.

Q. Do you find several steps recited in that claim? A. Yes, I do.

Q. Could you say how many steps?

A. Well, the first part of the claim starts out “A method of making boxes from double blanks, each cut,” and so on and so forth, “creased,” and so on—to state what the nature of the box is that the method is concerned with, but not constituting steps of the method. The steps are as follows:

(Testimony of Orland S. Christensen.)

“Said method comprising folding said extensions on the lower faces of sections to which they are respectively joined.” The word “folding” would be the first step.

Q. Would it help you to have a model such as Defendant’s Exhibit “17,” in connection with reading that (handing Exhibit “17” to witness)?

A. Well, I had better read the whole claim so we know what elements we are talking about when we recite the steps of the method.

“A method of making boxes from double blanks, each cut and creased to form two box blanks, having their box bottom forming parts at opposite sides of the double blank; each box blank being cut and creased to [262] form four hingedly-connected side and end walls”—double blanks would be up here and down here (indicating with Exhibit “17”), “connected in end-to-end series; bottom sections foldably joining the respective walls, two of the bottom sections each having a flap extension connected to an end thereof by a diagonal crease, respectively, extending toward an inner corner of said section.” These would be the bottom sections and these would be the flap extensions, and of course this would be the diagonal crease here in that case and the diagonal crease in this other section (indicating) and two more, here (indicating).

“The walls of each box blank being opposite corresponding walls of the other box blank of the double blank. Each wall and its associated section and extensions constituting a wall assembly.” Now,

(Testimony of Orland S. Christensen.)

the method: "Said method comprising folding said extensions"—which would be these extensions here, in accordance with the description and drawing and the claim language. "Folding those extensions on the lower faces of sections to which they are respectively joined." So now the first step of the process is to take this flat blank, according to the claim, and fold these extensions upon the lower faces—the lower faces being the faces of these sections to which these extensions are joined. It is done like that (indicating with Exhibit "17") [263] and then the second step is another folding step—"folding the respective bottom sections flat upon the upper faces of their connected walls, respectively." Well, these are the sections and the flaps are folded against them, and so we fold the sections against the walls to which they are adjoined—against the upper faces of those walls, in the language of the claim. "Thereby to upwardly expose the flap extensions," so you can see they are now on top of their connected sections and so they are upwardly exposed.

The third step is "folding each assembly at the end of the series upon the assembly adjacent thereto to cause said flap extensions to engage respective cooperating areas of the adjacent assembly, respectively." This is a little hard to manage, here (demonstrating with Exhibit "17").

Q. Maybe you had better read the language again.

A. I forgot to fold all of the sections against the

(Testimony of Orland S. Christensen.)

side walls, is what I did. These tabs have to be—as the claim states—folded. I will read the language. It says, “First folding the extensions on the lower faces of the sections to which they are joined and then folding the respective bottom sections flat upon the upper faces of their connected walls.” These are all bottom sections and they have to all be folded upon [264] their connected walls like this (indicating). And now we have an assembly of folded parts. “Adhering said flap extensions to said areas.” The flap extensions will be adhered to the edges of these cooperating areas of these next sections—between here and here and between here and here, and between here and here and here and here. Finally, “and adhesively hingedly connecting the free end edges of the series.” It doesn’t say how you adhesively connect, but I assume from the patent and the disclosure of the patent and from this model that you would apply adhesive between this flap and this flap and the underlying areas of the wall sections so that you would get a bound unit.

Q. With reference to the drawing in the Himes patent, figures 1, 2, 3 and 4, would you care to state how many steps appear to be shown there—going from figure 1 to figure 4?

A. Do you have a larger drawing so I can illustrate?

Q. No, I am sorry we do not.

A. Figure 1 shows the double blank initially. And the next step would be to take each of these

(Testimony of Orland S. Christensen.)

individual flap extensions—you can see it on the dotted lines here in the figure 2. Where they have been folded underneath their adjoining bottom sections—so the first step would be to fold these underneath the adjoining [265] sections. Then in figure 3, which is the next in the series, there appears to be adhesive—it is speckled on here—on the top face of the bottom sections which have all been folded over against their individual sections. In other words, between figure two and figure three all of these bottom sections are folded against the said side sections that they are connected to hingedly. With four of those bottom sections, of course, you will find adhesive speckled on the drawing on the bottom sections next to those carrying the flaps. So there is a step in there of putting adhesive on. I also see adhesive on these edges here at the left-hand end of figure 3. And then in figure 4 you can see that the sides of the blank, thus far partly folded, has been reduced to indicate further folding, and that would have been done by folding this end assembly on the right of figure 3 over and against the adjoining wall assembly and, finally, the one next to it. And then the left-hand end assembly folding it over against the adjoining assembly there. Now, this adhesive, which is number 3 at the left of figure 3, will come into place, because at that time the little glue tabs “15” will lap against it—and that is a necessary result of folding figure 3 into figure 4. Also, of course, the little flap sections “25” and “26” will lie directly [266] against these

(Testimony of Orland S. Christensen.)

patches of adhesive which have been placed on the bottom sections "21" and "20," being similarly numbered on opposite sides of the double blank.

So that the first step is to fold the flap extensions against their body sections, and then to fold the body sections—all of the body sections themselves, and put them against the flaps and apply the adhesive in the various places, naturally; and then to fold the unit so that the assembly of walls and bottom sections overlap in the manner of figure 4 so that the adhesive can form a bond between the areas which are interposed between. Figure 5 shows that the two parts of the double blank have been pulled apart.

Q. Thank you. We didn't want to go into "5"; it is unimportant.

Mr. Smith: I believe that is all, if you wish to examine.

Cross-Examination

By Mr. Mellin:

The Court: How long will your cross-examination take?

Mr. Mellin: About three minutes.

The Court: All right. [267]

Q. (By Mr. Mellin): Mr. Christensen, on this question of Berkowitz, being referred to by name and number by the examiner during the course that the Parks patent was traveling through the Patent Office, there is no question in your mind but that the patent examiner who cited it or referred to it

in that understood how the Berkowitz patent—the device shown in there, was made, from its drawing, and how it operated from its drawing and description, is there?

A. I honestly can't say that I can say that he had a complete understanding of it. He may have seen a passing similarity in the drawing of the Berkowitz patent and thought it would be pertinent to have it in the record without reading it thoroughly.

Q. Ordinarily, though, the examiners very carefully look at these patents—that is part of their job, isn't it—and analyze them?

A. That is part of their job, but sometimes the results indicate that they haven't done so.

Q. I see. But the fact it was cited would lead you to believe that he had done his job?

A. Well, the fact that it was cited would indicate, of course, that he found the patent in his search and that he noted some similarity, at the time he made his search, between the patent and the claims in this [268] particular application. But I can't say that I would deduce from that that he fully understood the Berkowitz patent necessarily, because I would just be looking into a crystal ball and wouldn't have any way of determining that.

Q. These examiners in these various divisions, they get familiar with the patents in that particular division, don't they?

A. Well, if they have been there any number of years, of course they do. They come and go very frequently, however, and it is difficult to say

(Testimony of Orland S. Christensen.)

whether the examiner who handled this particular case had been there a day or ten years.

Q. After the examiner who actually examines the case decides that it is to be finally allowed, what does he do with that application; doesn't he take that up with the Chief Examiner of the division, who has the final say?

A. Well, when an application is passed to allowance, the applicant is notified that the claims are all allowable in the application, and then——

Q. I beg your pardon. I think you did not understand my question. A. All right.

Q. When the examiner who actually makes the application and grants the objections and does the allowing, when he [269] gets through with it he goes to the Chief of the division to finally pass on it, does he not?

A. When you say finally pass on it; the Chief Examiner finally approves it.

Q. With respect to the Himes patent that you have just been referring to, is there any substantial difference between folding this little extension on the under surface of this flap first, and then putting that flap over and doing it simultaneously; is there any substantial difference in doing it the two ways?

A. Can you amplify the question? I don't know what you mean by "substantial difference."

Q. Let's see, you say—as we understood it during the trial—you said that the Himes patent calls for first bending this little extension—the Himes patent calls for putting this little extension under here first? A. Yes.

(Testimony of Orland S. Christensen.)

Q. And then doing it that way which makes it two steps? A. That is right.

Q. And you heard the testimony today by that nice Mr. West that was on the stand, when he said that the way the Staude machine did it was in one operation and not in two? A. Yes.

Q. Was there any substantial difference between the two? [270]

A. Well, as you pointed out through your questioning, I haven't had a great deal of contact with these automatic folding boxes and I haven't spent any time in box factories. But I would say whether there is a substantial difference or not depends upon just common sense; it depends upon whether or not you are doing it by machine of a certain type, we will say, or by another type—if you are doing it by machine. When you say “substantial difference,” this is a very simple thing, this little box. There are two little pieces, here.

Q. I am merely talking about whether you do the two operations in fast sequence or do them simultaneously, there is no real difference between them, is it?

A. It depends upon the whole thing as supported to begin with. I would say that I could pick these up and go like that (indicating) quite fast. If I did it this way, I would hold them between my fingers and continue to hold them and then press it down like that (indicating). Perhaps I would put it all the way up like this and then bring these back.

Q. They would all be equivalent, wouldn't they?

(Testimony of Orland S. Christensen.)

A. You end up the same way with this flap extension on the bottom section.

Q. By the way, you have been retained in this case, aren't you; you are a practicing lawyer? [271]

A. Yes, I am.

Q. And you, of course, expect to receive your usual remuneration—whatever it is in this case?

A. To compensate for my being away from my office.

Q. Is there any wording in the Himes patent which specifically requires a definite sequence in those steps?

A. Looking at the claim alone, I would say that there is, because the first step is folding the flap extensions on the lower faces of the sections to which they are joined.

Q. And the lower faces would always be the underside, wouldn't it—the one I point to would be the lower face?

A. When this is initially laid out like this, I would say from the language of the claim, that folding the flap extensions against the lower faces means the faces which are then down, because later on in the claim it says that the adjoining sections—which have these—we will assume—have these extensions on them, are folded upon the upper faces of the wall sections. Now what is an upper face on the wall section I couldn't say, because it depends on how the box sits in its ultimate position. If you attempt to refer to the word "lower" as being the lower face of the box when assembled or when in

(Testimony of Orland S. Christensen.)

blank form, we will say. In other words, [272] when it is folding these flap extensions on the lower section of the faces adjoined to them, I interpret that to mean the faces which are then lower—which are then facing downward, and I get that deduction from the claim, itself, by reading further to find that the second step or one of the next steps is to fold this unit up against what they refer to as the upper face of the side wall. If that is a side wall, it can never have an upper face if the box is used in its ordinary way because it is a vertical wall, and something which is vertical doesn't have an upper face, such as the wall of a building. Therefore, I would assume when they say folding this upon the upper face of the side wall, they mean—they necessarily mean upon the upper face as it is in the laid-out form of this blank.

Furthermore, continuing the language of the claim, they say, “thereby to upwardly expose the flap extensions”—well, the word upward is again used. The only thing I can derive from the claim is that they are talking about upper and lower in the condition of the blank during the course of the operation of folding it both ways.

Was that your question?

Mr. Mellin: No further questions. [273]

Redirect Examination

By Mr. Smith:

Q. In the Himes patent, which I believe you have before you at the present time, do you find

(Testimony of Orland S. Christensen.)

any statement of disclaimer or statement headed by the word "Disclaimer"?

A. On the last page of the patent there has been printed, under the heading "Disclaimer," a statement which starts out with the number of the patent, 2,243,431, Ross A. Himes, Piedmont, California, and then the title of the patent, "Paper Box and Method of Making the Same." Patent dated May 27, 1941; Disclaimer filed October 24, 1941, by the Assignee, who is "Nolox Company of America." Stated in this disclaimer statement, here. Then it goes on, "hereby enters this disclaimer to claims 2 and 6 in said specifications." Referring to the patent, itself. And then underneath that it says "Official Gazette, November 18, 1941," which refers to the official gazette of the United States Patent Office in which this disclaimer was published.

Q. How many disclaimers are there in the Himes patent? A. There are nine altogether.

Q. Under that word Disclaimer how many were mentioned?

A. The Disclaimer is to claims 2 and 6.

Q. Only to 2 and 6, is that right, Mr. [274] Christensen?

A. Yes; merely to claims 2 and 6.

Q. And that leaves how many in the patent?

A. That leaves seven.

Q. What is a disclaimer?

A. A disclaimer is an act by the owner of the patent authorized by the patent statutes to enable the patent holder to, in effect, remove from his

(Testimony of Orland S. Christensen.)

patent those claims which should not have been in there in the first place. Maybe I should qualify that—the wording is not too well stated. The statutes authorized the disclaimer of parts of the claims or any number of claims or any parts of any claims when it appears to the patent holder that those claims are invalid.

Q. Have you finished?

A. I believe so, unless you wish to have me amplify it.

Mr. Smith: That will be all.

Mr. Mellin: That is all. [275]

* * *

ROSS A. HIMES

previously sworn, recalled to the stand as an adverse witness.

Direct Examination

By Mr. Smith:

Q. Mr. Himes, I am handing you Defendant's Exhibit "2," which is the Himes patent in suit, and I would like you to refer to claim 1 thereof and I would ask if you would explain in your own terms again in the latter part of the claim following the words "a method comprising," how many steps are described as we go along, in reading the language; if you would read the language and we will count the steps as we go along.

A. This is the first time I have done this, Mr. Smith. I hope that I can read the steps or count the steps as you have asked me to. [276]

(Testimony of Ross A. Himes.)

“Said method comprising folding said extensions on the lower faces of sections to which they are respectively joined.” That would be one step, wouldn’t it?

Q. One step.

A. Yes. “Folding the respective bottom sections flat upon the upper faces of their connected walls respectively, thereby to upwardly expose the flap extensions”—that would be two steps, wouldn’t it?

Q. Two steps.

A. “Folding each assembly at the ends of the series upon the assembly adjacent thereto, to cause said flap extensions to engage respective cooperating areas of the adjacent assembly respectively.”

Q. I would say that is three steps; is that right?

A. Three, yes.

Q. That is bringing the ends in; is that right?

A. It seems that that would be three, yes. “Adhering said areas”—that would be four—“and adhesively hingedly connecting the free end edges of the series.”

Q. Five.

A. That would be five steps with a question—that perhaps the last two—not perhaps the last two, but surely the last two would be accomplished at the same time, simultaneously.

Q. The last two might be accomplished at the same time, is [277] this what you say?

A. They would on any machine that I know of, yes.

Q. There are two things happening at the same

(Testimony of Ross A. Himes.)

time; that is what you are really saying, isn't it?

A. Well, yes—approximately simultaneously.

Q. That is all with respect to that. Now this is Plaintiffs' Exhibit "A," a copy of the Parks patent; I am sure you have read that, haven't you, sir?

A. The Parks patent?

Q. Yes. A. Yes, sir.

Q. I would like you to refer to claim 2. Would it be easier for you to read it if it was black on white?

A. I was going to ask for a soft copy. Without my bifocals this is a little bit difficult and I don't have them with me.

Q. These are identical, are they not—as far as you can see right now?

A. Well, I assume so. [278]

* * *

Q. (By Mr. Smith): With your permission I would like to point out the elements that we find in the Berkowitz patent. You may direct. We will count them as we go along.

A. Are you going to point them out as I read, Mr. Smith?

Q. Would you point them out and let me read them? A. I would much rather sit here.

Q. All right. I will point them out for you.

A. Are you ready?

Q. Yes, sir.

A. Claim 2: "A folding carton comprising a plurality." [279]

(Testimony of Ross A. Himes.)

Q. This Berkowitz does show a folding patent, does it not?

A. Yes. "Comprising a plurality of side walls."

Q. Is this the plurality, these elements A, B, C, D, in capital letters? A. Yes.

Q. Are there four?

A. Four is the plurality, yes; "connected in rectangular formation."

Q. Do you agree that in the box they would be in rectangular formation if these four walls are connected?

A. Is a square a rectangle, Mr. Smith?

Q. I believe it is.

A. I am asking you. I don't know.

Q. I think it is.

A. Then it is a rectangle. "And a bottom wall formed of two identically similar sections."

Q. Can we say that in figure 6 we see a bottom wall, here (indicating), can you see from there?

A. Yes.

Q. Is that a bottom wall?

A. That is a bottom wall.

Q. Are these the two sections here and here marked with the letters "E" and "B"—is that right? A. Yes.

Q. And they are identically similar? [280]

A. To all practical purposes they are identical, yes.

Q. And that makes two more elements, or six, does it not? A. I haven't counted them.

Q. Well, let's go back. 1, 2, 3, 4—and one bottom half element here and one here—is that right?

(Testimony of Ross A. Himes.)

A. That adds up to six, yes. "Each section being composed of two elements."

Q. Now we are talking about this or this, are we not?

A. "Each section being composed of two elements."

Q. May we call this element on the lower side of the dotted line 23 one element and that above another element?

A. That would be questionable with me. Elements to me mean separate parts. To me I always see two parts on that box.

Q. Well, let's read the rest of the phrase and then maybe we will understand it.

A. "Each section composed of two elements hingedly connected to lower edges of two adjacent side walls."

Q. All right. Now, "hingedly connected" first. Is that dotted line there a hinged connection?

A. That is a creased line which acts as a hinge.

Q. Thank you. Now we have to this moment six elements, and each of these are divided into two—or do you deny that? [281]

A. I would be inclined to deny that particular reading, so far as my own analysis of this claim is concerned. We have said here—going back—"each section being composed of two elements hingedly connected to lower edges of two adjacent side walls." Now, there is a question there.

Q. We will cover that.

(Testimony of Ross A. Himes.)

Mr. Mellin: Mr. Smith, will you let the witness complete his answer?

A. Perhaps I am stuck with an opinion, Mr. Smith. But to me elements in the box art mean separate parts which may be connected or be separate. However, I will read your claim for you.

Q. (By Mr. Smith): All right. Then at the moment it is argumentative whether we have added an extra two elements, bringing it up to six?

A. To me it is argumentative.

Q. However, we do have a creased line 23, which you say acts as a hinge? A. That is right.

Q. Lying between a part above the crease line and something below the crease line?

A. Yes, sir.

Q. All right.

A. "Each section being composed of two elements hingedly [282] connected to the lower edges of two adjacent side walls." That completes that portion.

Q. That part of the bottom section, little letter "d" in figure 1 of this Berkowitz drawing, above the creased line, is connected to the part capital letter "D," is it not? A. That is.

Q. And in the completed box as appears elsewhere in the drawing, the part below the creased line 23 is connected to the wall "A," is it not?

A. In the completed box, but not in the blank.

Q. We are not talking about the blank.

A. That is where the point of argument comes in.

Q. Yes. But the patent claim that you read we agreed called for a box?

(Testimony of Ross A. Himes.)

A. All right, sir. Do you want me to repeat that?

Q. No; I think that that was explanatory and not counting another element.

A. "The two elements of each section being permanently connected."

Q. It is argumentative at the moment whether or not above or below the line 23 is two elements, but whatever they are they are permanently connected, are they not?

A. Yes. They have never been separated.

Q. Does the claim say that they should have been separated? [283]

A. No. It says that they are permanently connected.

Q. All right.

A. "And being creased on a line, permitting folding thereof to correspond to the folding of the associated side walls."

Q. Now, that line permitting the folding thereof, is that the line 23?

A. Yes—if you are pointing to 23. I can't see it from here.

Q. I assure you that I am.

A. It is the diagonal creased line.

Q. It is that diagonal creased line right there (indicating), and that permits the parts to come up inside, in the center?

A. That is right.

Q. Thank you.

A. "The bottom sections being provided with inter-engaging locking means."

(Testimony of Ross A. Himes.)

Q. Are those the lugs 21 and 21B?

A. Yes.

Q. Two more elements—at the moment it is argumentative whether or not we have ten, but at least we have two more at that point, do we not?

A. Yes. I hope you are counting them, Mr. Smith. I can't do that and read the claim at the same time. [284]

Q. All right; yes.

A. "Comprising on each section a lug."

Q. Is 21D a lug? A. 21D is a lug.

Q. Thank you, sir.

A. "Projecting from substantially one-half of its free margin."

Q. Let's clear up the words "free margin" for a moment. Is there a free margin on Berkowitz figure 1?

A. Well, a free margin in a box of that construction in box makers' parlance would be the margin that is not connected to anything else; therefore it is free, so it would no doubt include the entire edge.

Q. Between the corners of the box, is that right, as in Parks figure from that corner to the diagonally opposite corner; is that what you are talking about?

A. Oh, no, not in Parks. We are speaking about Berkowitz now.

Q. Parks is your patent, and I think that the language comes from there—so that we can understand it—could you show it with a box model,

(Testimony of Ross A. Himes.)

maybe, such as Plaintiffs' Exhibit "G" (handing exhibit to the witness)?

A. In this model the free margin—was that the term——

Q. Yes. [285]

A. ——would be all of this (indicating).

Q. From approximately one corner to the diagonally opposite corner of the box; is that right?

A. Yes, that is right.

Q. And that is the free margin of the bottom section?

A. That is the free margin of the bottom section.

Q. Going back, just read that last phrase that included the words "free margin," please?

A. All right, sir. "Comprising on each section a lug projecting from substantially one-half of its free margin."

Q. Now, does this free margin in Berkowitz, Exhibit "1," extend from the corner that I am pointing to out here to this corner (indicating) which is near the number "28"?

A. That would be according, Mr. Smith, to how much value is put on the word "substantially" in this claim. It so happens in the Berkowitz structure, the bottom end of that lug is tapered to the vanishing point when it reaches the end furthest from the body of the box, having the effect of leaving an opening when the box is erected. Every sample that I have seen made of that box—and I have made some myself and seen others that others have made—leaves such an opening or an open space

(Testimony of Ross A. Himes.)

between that lug and the adjacent edge of the next lug over which it is supposed to overlay. It [286] does not overlay in its entire length; so I would question that in the Berkowitz box you have a coverage of one-half of the free margin. I question that very strongly.

Q. Is it not true, however, that in every lock-bottom box the locking action has to take place exactly at the intersection between the—of the diagonals between opposite corners?

A. Would you mind repeating that? I don't think that is correct.

Q. Every box that is four-sided, you can draw a diagonal from opposite corners, can you not?

A. You can.

Q. And those diagonals will intersect, will they not? Let's look at Parks figure 7, a diagonal from this corner 14 to this corner 10, and from the corner 16 to the corner 12——

A. Yes.

Q. ——would be an intersection, would it not?

A. Yes.

Q. And the intersection would be exactly the point at which the locking action takes place, the interlock?

A. That is not necessarily true, Mr. Smith. I have seen boxes where the interlocking means is not effected on an intersection of the diagonal. It is accomplished [287] somewhere on one of the diagonals, that is not necessarily true.

Q. In the Parks box it does happen to be exactly in the center, does it not?

A. That is right.

(Testimony of Ross A. Himes.)

Q. Is that not true in the showing of the Berkowitz patent? A. Yes, I would say that it was.

Q. Therefore a line from the corner between the parts large B and large C, this diagonal coming down here and extending to near the numeral 28 is a diagonal of the box bottom; and that point with the numeral and the line 22 point 2 would be exactly in the middle, would it not?

A. In that particular box, yes. That is a square box.

Q. Does not this lug 21D extend from that point to the corner adjacent to the numeral 28?

A. That again forces me to repeat my observation of a few moments ago.

Q. Which has to do with the taper, is that right?

A. It has to do with the taper to the vanishing point at one end.

Q. Does the claim say anything about a taper or not a taper? A. This claim?

Q. Yes. [288]

A. No. This claim states that it covers one-half. I am questioning that Berkowitz covers one-half.

Q. Does it make any difference that this coverage down here may be extremely slight?

A. A great deal of difference, Mr. Smith—a tremendous amount of difference.

Q. Is there anything more to that claim that you haven't read? A. Yes.

Q. Will you continue?

A. "Said lugs being staggered with relation to each other when said bottom wall is closed."

(Testimony of Ross A. Himes.)

Q. Are those lugs 21 and 21B staggered with relation to each other when the bottom wall is closed? A. Yes.

Q. That is shown in figure 6, is it not; you can look at the drawing?

A. Yes, I know the drawing well enough to say that they are staggered with relation to one another.

Q. Yes, that is true.

A. "The connection of said bottom elements to each other."

Q. The word "elements," I believe, describes the parts that lie above the creased line 23 and below the creased line 23; is that right?

A. You would have to assume that, I suppose—if you are [289] going to assume that they are two elements.

Q. Yes; all right.

A. "And to the side walls."

Q. In the assembled box are not those bottom elements joined to the side walls?

A. In the assembled box they are.

Q. And the first three words of the claim are?

A. "A folding carton."

Q. All right.

A. "Affording a positive means for moving the bottom sections toward position for closing said bottom wall."

Q. Do you grant that that occurs in the Berkowitz box?

A. In the Berkowitz box that same positive means for moving the bottom sections toward posi-

(Testimony of Ross A. Himes.)

tion for closing said bottom walls up to there is true.

Q. That is right.

A. And the rest of the claim reads, "and for engaging said locking means."

Q. Do not these locking means—the ends of the lugs 21D and 21B, engage when this box is set up?

A. They will not engage automatically.

Q. They are shown engaged in figure 6, are they not?

A. They are shown engaged in figure 6, but they will not engage automatically.

Q. Were they not engaged in this model when the box was [290] erected without the use of any other means than pressure from the opposite corners?

A. Before I answer that I will have to make an observation here that this box is not made according to the drawings shown in the Berkowitz patent.

Q. Very well. In what respect is it not the same?

Mr. Mellin: Before you untangle that you recall Mr. Thom said there was breaking and bending of the tabs; will you state whether you are doing that now or whether it was already done?

The Witness: It was already done. That is one of the two things I was going to mention primarily. Before this box was demonstrated the other day—I had better show this to the jury also—this box had either been worked a number of times—it was not a fresh sample—or it had been deliberately arranged so that these semi-circular portions at the

(Testimony of Ross A. Himes.)

ends of the lugs were bent upward. The board is cracked, effecting a crease line so that when for maybe the fourth, or fifth, or dozens of times, the box is to be closed together for closing, there is no resistance of those little semi-circular portions to assuming their proper position. In other words, they have been pre-guided so that they will do that.

Another point that was brought out in relation to [291] this same sample——

Q. (By Mr. Smith): Excuse me just a moment. That is just your opinion that they were pre-guided?

A. I say perhaps they were pre-guided. Perhaps the box was worked so many times that it gave the same effect as if it were pre-guided, Mr. Smith.

Q. Thank you.

A. The second point with which this sample does not conform to the Berkowitz disclosure is that this same curved portion at the end of these lugs is shown on all of the Berkowitz drawings as being, to my—and to anybody else's eye that I have ever talked to that looked at the Berkowitz drawings—a complete half circle in outline.

If the jury had opportunity and your Honor had opportunity to inspect the sample closely, you could see that the portion comprising the end of the lug which is a complete half circle in the Berkowitz drawings is here cut down to closer to a quarter of a circle which obviously means that it is easier

(Testimony of Ross A. Himes.)

to guide those sections past one another even though they might not have been previously worked or guided so that they would pass one another.

Let me clarify that by saying that it is my contention that if a box similar to this, following [292] closely and specifically the Berkowitz disclosures in all details, were made freshly and had never been operated before, it would not inter-engage and interlock automatically when pressure was applied to the ends of the box.

Q. You are in effect saying that to make a box according to the Berkowitz patent you have to follow every exact detail shown in that patent, is that right?

A. Mr. Smith, when you are speaking about the disclosures in a patent, if you deviate from those disclosures you are going into something else which might possibly infringe other rights.

Q. You testified you have been a sample maker?

A. I have been a sample maker for many years.

Q. And we are talking about sample folding boxes, are we not? A. Oh, yes.

Q. And you have made samples for customers to meet their requirements, have you not?

A. I have made them possibly for my own use because of my particular niche in this industry that I am in. I have very seldom made them for customers.

Q. If you were making them for customers, and the customers present to you an idea of how they

(Testimony of Ross A. Himes.)

want their box made, do you follow exactly the way that they say that it must [293] be made?

A. I would have to answer that by saying that if I deviated knowingly into ground that might perhaps make a better box than the one that they had been using, or requested, I would be inclined to be a little bit careful about infringing the claims of valid patents.

Q. Well, that isn't the question we are talking about right here. You have just said that deviation might occur, is that right?

A. Deviation might occur without thought, yes; any number of times.

Q. Isn't it true that the deviation might occur because you are skilled and you use the things that you know?

A. I wouldn't consider it too skillful to deviate to the point where you were laying yourself liable to action for infringement. That to me would not be skillful.

Q. Will you step down and take a very careful examination of this drawing?

A. Yes, I will be glad to.

Q. I call your attention to the bottom section attached to the wall with the large letter "B" in figure 1 of Berkowitz and I ask if that which is above the pencil line and extension of the dotted line 23 is a true half circle?

A. That one doesn't appear to be a true half circle. May [294] I have the pointer?

(Testimony of Ross A. Himes.)

Q. Yes, you may.

A. In this drawing, and I assume that this is a blown-up photograph. Is that right?

Q. A photostat.

A. A photostat. The one on the other panel is, to my eye, a true half circle. Throughout the rest of the drawings, calling attention in particular to the same section in figure 2 in both bottom sections, we have a true half circle. So far as we can see in figure 3, it is a true half circle. In figure 4, similarly, it is hard to determine figure 5. And most certainly in figure 6 in the view of the bottom of the box after it is inter-locked, those are true half circles on either side of the center.

Q. You have said that this lug 21D is a true half circle, is that right, in figure 2?

A. It looks like it.

Q. Will you take that pencil and examine this line and this line?

A. Mr. Smith, are you trying to prove these are not identically similar sections?

Q. No, I am not. We have already admitted they are identically similar sections.

A. Then would you say that this would be identically [295] similar to this?

Q. There are slight variations or deviations, one from the other, are there not?

A. Apparently there are slight deviations one from the other which to me would not make them identically similar. If you want to get down to figure

(Testimony of Ross A. Himes.)

6 and do the same thing, apparently there they are identically similar, are they not?

Mr. Mellin: Let him ask the questions.

The Witness: Pardon me.

(Witness returns to the stand.)

Q. (By Mr. Smith): Returning again to that last phrase of the claim which you read. I think you have it in mind do you not? A. I hope so.

Q. If you like to, I hope you will take the time to read it.

A. If necessary, I shall read it.

Q. The language says that these elements 21D and 21B inter-engage and lock, is that right?

A. Now I will have to refer to the other claim. Of course, we don't refer in this patent to 21D and 21B.

Q. No. We are reading that claim in view of the Berkowitz drawing.

A. "Affording a positive means"—"a positive means"— [296] and the word positive is said advisedly and accented advisedly—"for moving the bottom sections toward position for closing said bottom wall and for engaging said bottom means.

Q. We have agreed that the bottom closes, did we not? A. Not entirely.

Q. I did not say locking—I said close.

A. It will not close.

Q. It moves toward position for closing, does it not?

A. It moves toward position for closing of it. It

(Testimony of Ross A. Himes.)

can be engaged by putting the fingers inside of the box and pulling the locking parts past one another.

Q. Take the box and fold it.

A. I will be glad to do that. I know, of course, it will reach the closed position because of what I just described to the jury as being preparation for such closing. I will hold the bottom up so that the jury can see it. The jury will notice that those ends of the lugs having been pre-prepared, we get by there rather easily and the box closes. (Demonstrating for the jury.)

Q. Thank you. Now, let us refer to claim 6. I beg your pardon. Going back a moment in your testimony, you have said that the ends of the lugs here have been manipulated in the opening and closing of this box, have you not?

A. They have been pre-bent by one means or the other.

Q. Have you ever read Plaintiffs' Exhibit "B," the file [297] wrapper in the file patent history back of the Parks patent?

A. No; I never read file wrappers, Mr. Smith. That is the job of my attorneys.

Q. However, the language that is contained in them is sometimes rather explanatory, I believe, and I would like to call your attention——

Mr. Smith: If I may approach the witness, your Honor——

Q. (By Mr. Smith, continuing): ——that this

(Testimony of Ross A. Himes.)

is a letter to the Patent Office addressed to the Commissioner of Patents; it is marked with the identifying character 5, the line "B" underneath it?

A. That is right.

Q. That it is marked as page 26, page 27 and page 28 of this record in pencil marks and in photostats?

A. Those are in photostat form, those marks.

Q. I call your attention on this page marked 27, which also has the numeral "2" on it, about the fourth line, and ask you to read it, please?

A. Under the heading "Remarks"?

Q. Yes, sir.

A. Are these remarks of the examiner?

Q. No, sir. If you will look at the ending, you will see that they are signed—— [298]

A. I would like to understand what I am reading.

Q. All right. If you don't mind I would like to explain that this is a letter written by the attorneys for Mr. Parks. It bears their signature, "Bair, Freeman and Sinclair." A. I see.

Q. And that we can all see the signature that appears here on this exhibit.

A. Do you want me to read starting with the words "Herewith enclosed"?

Q. Yes. If you wish to read it all it is perfectly all right. I think we will save a little time if you read beginning with that line "Herewith enclosed."

A. All right. "Herewith enclosed are models of the Cramer carton and of applicant's carton."

(Testimony of Ross A. Himes.)

Q. Who would applicant be?

A. Applicant, I assume, would be Parks, Hildenbrand and their attorney.

Q. That means, does it not, to you, that there were some models accompanying this letter to the Patent Office, is that right?

A. That is what it says, Mr. Smith.

Q. Yes? A. Yes.

Q. On the next page would you read the first full paragraph [299] that appears there?

A. "In applicant's device, on the other hand, it will be noted that the lugs 70 snap past each other."

Q. Just so that the jury can follow, I think that we are talking about this numeral "70" and this lug along here, are we not?

A. I would rather see it closer.

Q. Yes, if you wish.

(Witness approaches the easel and exhibit.)

Q. (By Mr. Smith): Do you see that number 70? A. Yes.

Q. And that that designates a lug right along there?

A. Yes; no doubt that is what they are referring to.

Q. May I draw a line from here to here and indicate that that is the lug?

A. If you so please.

Q. And probably although this is not marked, is this element on the lower part of Plaintiffs' Exhibit "G" that same lug?

(Testimony of Ross A. Himes.)

A. Yes. Do you want to mark that in the same manner?

Q. Let's put the numeral "70" on there, shall we?

A. I don't mind.

Q. All right (drawing numerals 70 on exhibit). Is that right?

A. That is all right. [300]

Q. Will you just read the language?

A. "In applicant's device, on the other hand, it will be noted that the lugs 70 snap past each other and the bottom can then be pressed to a flat position. When, however, it is pressed upwardly from the bottom, the lugs engage each other, tending to resist such pressure."

Q. Just a moment. What do you mean by—what do you understand to be meant by the words, "pressed to a flat condition"?

A. I would assume that means a continuance of the pressure on the ends. Obviously if you work one of these models you can see what that pressure is. It says here that these lugs "snap past each other."

Now, if they snap past each other they must go into a flat position or they wouldn't snap; "and the bottom can then be pressed to a flat position."

Q. Such as we have in Plaintiffs' Exhibit "13"?

A. Well, with the exception that those will not snap past each other.

Q. Will you go on and read the language, please?

A. "When, however, it is pressed upwardly from the bottom, the lugs engage each other, tending to resist such pressure."

(Testimony of Ross A. Himes.)

Q. Are these lugs engaged?

A. Those lugs are inter-engaged, yes. [301]

Q. And they would resist pressure from underneath, is that not right?

A. That is according to whether or not the full half circle is used in making the box. If a full half circle was used, I would say they would have a pretty good chance of remaining engaged. If they are cut down below a half circle I would say they wouldn't.

Q. This stamp of the Clerk's has weight, does it not? A. Yes, I suppose.

Q. And it would be exerting pressure upward, would it not (placing Clerk's stamp on the box)?

A. All right, it holds the stamp.

Q. Shall we go on? A. Yes; pile it on.

(Mr. Smith places stapler on box.)

A. Have you an ink bottle handy? I mean don't put it out on the corners, Mr. Smith, that isn't fair.

Q. (By Mr. Smith): Well, how about a pitcher of water?

A. Well, a pitcher of water would be held up by the ends—by the side walls.

Q. Oh, now, just a moment—the side walls help in supporting this bottom, do they?

A. When you have the box upside down, yes.

Q. We are talking about pressure that would collapse that thing. Does it make any difference if the box is [302] upside down or from the bottom

(Testimony of Ross A. Himes.)

upward if the box is right side up; pressure is pressure, isn't it?

A. What purpose is there in having the box resist that upward pressure? When contents is put into the box, pressure is downward, isn't it? Here I am asking you questions again. Excuse me, Mr. Smith.

Q. I understood it was your point that in the Parks patent the point was made that this box would resist that kind of pressure?

A. It does.

Q. Did it not?

A. Yes. You are just saying pressure. You are not going into degrees of pressure.

Q. All right. Does the patent say how much pressure it should resist?

A. No. It resists pressure, Mr. Smith. Let's have it resist pressure. Do you want me to go on?

Q. Yes. There is a little more language in that same paragraph I would like to have you read.

A. All right. "The model has been operated a great number of times"—this is the model he sent to the Patent Office—"and one of the lugs is somewhat weakened." He is apologizing for that, you see.

Q. Yes.

A. But it can be readily seen that when it is not so [303] weakened, it will catch on the other lug and thereby actually provide an interlocking feature to prevent refolding of the carton by mere upward pressure on the bottom.

(Testimony of Ross A. Himes.)

Q. Does the letter "X" appear in there—in the next sentence, I believe?

A. There is an "X." I thought that was a correction. What is that "X"?

Q. It apparently was used in that model to designate a lug, was it not?

A. "The model has been operated a great number of times and one of the lugs marked "X" is somewhat weakened."

Q. Now, unfortunately we do not have access to the model which was employed, but I would call your attention to this page 29 of this file wrapper exhibit. It is headed by the Patent Office and is addressed to Bair, Freeman and Sinclair, is it not?

A. Yes.

Q. Would you read the two or three sentences that appear there?

A. "Responsive to amendment filed December 4, 1934. The samples filed on the date of December 4, 1934, are returned herewith. The case is being passed to issue."

Q. Thank you. That would appear to mean that the Patent Office had returned the models—the samples to the [304] attorneys? A. Yes.

Q. And explained the fact that we would not find them in the file at this time, is that right?

A. I suppose so.

Q. Now, let us refer to claim 5 of the Parks patent which you have before you and again we will go through, element by element, and look at the

(Testimony of Ross A. Himes.)

Berkowitz drawing as we did before; I think we can go a little faster this time—but if not, why, you just take your time.

A. Thank you, sir. “Claim 5. A folding carton comprising a plurality of side walls hingedly connected at their edges to form a polygonal”—is that it?

Q. Polygonal. In the first place, you have said a plurality of side walls—that is more than two, is it not?

A. Yes.

Q. It would be more than one, I believe?

A. Yes.

Q. It could be two or three or four or five, something like that?

A. Yes. “A polygonal enclosure.” That would be a question—it might be more than three.

Q. You know what a polygon is?

A. Yes. [305]

Q. Will you accept Mr. Christensen’s definition of a polygon?

A. I will accept Mr. Christensen’s definition of a polygon.

Q. Then we have 34, do we not?

A. Yes. “Hingedly connected at their edges to form an enclosure.”

Q. You say hingedly connected at their edges; would you say that lines ten, eleven, twelve, and a joiner at the line thirteen, which is where the folding flap is, are hinged connections?

A. Yes.

Q. All right.

(Testimony of Ross A. Himes.)

A. "And a bottom wall formed in a plurality of sections."

Q. How many is that?

A. A plurality is more than one, Mr. Smith.

Q. We have here two, do we not?

A. You have there two, yes.

Q. Thank you.

A. "Each section being hingedly connected at two edges to the bottom edges of two adjacent side walls."

Q. Is that not the condition that exists in the Berkowitz drawing—each section, and this is a section and it is connected to two adjacent side walls as shown in figure 4, is it not? [306]

A. When the carton is put together and completed and erected, that is true.

Q. Thank you.

A. "And being creased for folding on a line extending across the section from a point adjacent the hinged connection between the two side walls to which said section is connected."

Q. Now, the line 23 we consider the creased line, do we not? A. Yes.

Q. And it extends from adjacent the corners of the two adjacent side walls, to which it is connected, do they not? A. Yes.

Q. Do you think that figure 4 fairly shows that?

A. Yes.

Q. Thank you.

A. "Whereby said section may be folded into

place parallel with said side walls when the carton is collapsed.”

Q. That is this flat condition we are talking about?

A. The flat condition, yes. “The free margins of said sections”——

Q. That again is this wall of sort of a broken diagonal line along here, is it not?

A. Yes. It is the edge from one corner to the other [307] corner.

Q. Yes.

A. “The free margins of said sections being formed with similarly shaped inter-locking means.

Q. Are these the similarly shaped inter-locking means, the elements 21D and 21B? A. Yes.

Q. Thank you.

A. “Adapted to inter-engage for holding the carton in extended position.”

Q. Do they inter-engage in this case?

A. They are shown inter-engaged in that drawing.

Q. Did they in the model of Exhibit “13”—did they inter-engage in this model when it was erected? A. Yes; and I have explained why.

Q. Yes.

A. “The interlocking means of each free margin comprising a lug.”

Q. Again that is this 21B and 21D, is that right? A. Yes.

Q. All right.

A. “Extending along one-half of said margin.”

(Testimony of Ross A. Himes.)

You will notice in this case, Mr. Smith, we do not say substantially one-half; we say one-half.

Q. That is right. [308]

A. That means one-half—not almost one-half.

Q. Does the element 21D extend from the center of the carton—and I will grant your word tapering—in a tapering manner outward to that corner adjacent to the numeral 28?

A. I don't know whether your language is completely accurate. It does taper toward that corner from the widest part of the lug to the corner.

Q. This is Defendant's Exhibit "4," a copy of the Berkowitz. I merely want to save you having to go way over there. A. Yes.

Q. Do you see this dotted line 20 which extends from that center outward near the numeral 28?

A. Yes.

Q. Would you say that that dotted line extends half of that free margin?

A. With the same reservation, that it meets the tapering line somewhere near the corner.

Q. All right; we will pass the point. You may go on.

A. "The inter-locking means of each free margin comprising a lug extending along one-half of said margin and adapted to over-lap the unlugged half of the margin of the next section."

Q. In this erected position of Berkowitz, figure 6 is not [309] the lug 21B—this lower one on the right-hand corner—over-lapping the unlugged half of the opposite section?

(Testimony of Ross A. Himes.)

A. A substantial portion of it is.

Q. Would you care to just—I will have to ask you to step down, I am sorry.

A. That is quite all right. I don't mind at all (witness approaches easel).

Q. Do you see that lug marked 21B that lays right in there? A. Yes.

Q. A dotted line on one side and a solid line on the other and a rounded end? A. Yes.

Q. Is that over-lapping this portion right here which is marked?

A. In that figure 6 on this lug—the drawing is shown so that that appears to be over-lapping on the corner. However, on the one opposite it comes to an exact point. There we get into the question of similarity.

Q. How do you explain the fact, if you can, I don't expect you to know exactly—but how do you explain the fact that that does show over-lap?

A. If we wanted to go into the specifications of Berkowitz, I think that that point would be made a lot clearer. [310]

Q. I will give you an opportunity to do so. Is there any further language in claim 6 that you haven't read?

A. Yes. "And adapted to over-lap the unlugged half of the margin of the next section, the bottom sections being automatically moved into position for engagement of the inter-locking means when the side walls are extended to the normal open position."

(Testimony of Ross A. Himes.)

Q. Do these various views, figure 3, figure 4, figure 5, indicate that that is a condition that takes place in Berkowitz?

A. That is what is no doubt ambitiously sought in Berkowitz but which does not happen in constructions made according to the Berkowitz disclosures.

Q. I am returning to you Defendant's Exhibit "4," a copy of the Berkowitz patent, and I am calling your attention to page 2, the line beginning number 55, and I ask you to read this wording—"To set up" and so forth?

A. Do you want me to start with line 40 where it says "Binding or tying means in the form of cords"?

Q. Let's answer my question first and then you will have your opportunity to discuss that later.

A. Oh, I see. I mistook the place here.

Q. Line 55, please.

A. 55. "To set up the box for filling"——

Q. Now, we are talking about the Berkowitz box, aren't we? [311] A. Yes.

Q. All right.

A. "To set up the box for filling, it is set up right, as will be understood from figure 3."

Q. That is this position—upright—the bottom parts are downward and this is upright, is that it (indicating with Exhibit "13")? A. Yes.

Q. All right.

A. "And the operator will grasp the corners

(Testimony of Ross A. Himes.)

thereof at the upper end of the hinge lines 10 and 12"—that is the two opposite ones there.

Q. We are talking about these, then, aren't we?

A. Those, yes. "And draw the same apart somewhat sharply."

(Mr. Smith demonstrates with carton.)

A. Oh, beautiful.

Q. (By Mr. Smith): Will you do it?

A. Not on that box, if you don't mind. It has been worked seventeen times, sir. I would like to try it on a fresh sample.

Q. All right.

A. "Drawn apart somewhat sharply with the result that the hinge lines or corners 11 and 13 will be brought toward each other"—

Q. Just a moment. These corners that you are speaking [312] about, 11 and 13—are this corner down here and this one out here, is that right?

A. Yes.

Q. They are not the ones that have any connection with a division between the bottom halves, are they?

A. Well, now, wait a minute (witness approaches the easel and the Berkowitz drawing).

"With the result that the hinge lines or the corners 11 and 13 will be brought toward each other"—you are pulling on 10 and 12, I imagine.

Q. What?

A. You are opening the box by pulling on 10 and 12, aren't you?

Q. No. Oh, yes, you are right—I beg your pardon.

A. “While the bottom wings ‘B’ and ‘D’ will snap downward into flat position, each wing extension, 21B or 21D gliding easily and directly over the straight edge 19 of the opposite wing and coming directly into inter-locking engagement with the opposite wing in the notch 22, but is effectively supported by integral connection along the hinged line 15 or 16 with one side wall and with overlapping and inter-locking engagement with the bottom edge portion of the next wall through the flange 18B or 18D and”—do you want me to continue?

Q. I don’t believe you need to go any farther. We have [313] got the box erected, have we not?

A. Yes. We have the box erected. Do you want my comment on that, Mr. Smith?

Mr. Mellin: No.

Mr. Smith: No. Your attorney will probably reveal it when he has his opportunity.

* * *

Q. In Exhibit “G,” which is before you, we marked a lug with the numeral 70, did we not?

A. Yes.

Q. By drawing a line from that notch to this corner? A. Yes.

Q. Will you describe the shape of the end of that lug, please?

A. Which end, Mr. Smith? [314]

Q. The end nearest the notch.

A. The end nearest the notch?

Q. Yes.

(Testimony of Ross A. Himes.)

A. It is shaped—well, the most part is straight and parallel to the crease lines which join the side and end walls. And it has been rounded on the outside corners.

Q. I think it is a little bit confusing when we use the word “parallel to the creased line,” so I will point to the drawing in the Parks patent figure 1, and I think that you can see the lug in the Exhibit “G” that you have before you; and starting at that notch, at the bottom of that little notch, what is the first line that extends from that that forms part of the end of the lugs; is it a straight line?

A. This is a straight line, yes.

Q. And what does it join with?

A. In the open position of the box?

Q. Yes, sir; what does that straight line join with in the end of the lug; does it join with another straight line?

A. It intersects another straight line, yes.

Q. It intersects another straight line. We are talking, then, about two lines intersecting, are we not?

A. That is right. [315]

Q. And when two lines intersect, do we enclose an angle?

A. There must be an angle if two straight lines intersect.

Q. Then the end at that particular point is angular, is it not?

A. Yes.

Q. And then that second straight line intersects with an additional straight line, does it not?

I am speaking, sir, of this line which runs along

(Testimony of Ross A. Himes.)

the outside of the lug, somewhat parallel to the pencil line which was drawn on here?

A. Oh, excuse me. I thought you were referring to the line running in the other direction.

Q. No, sir.

A. Well, then, I will have to qualify what I said a moment ago. Instead of a square intersection of those two lines to which you are referring, we have a rounded corner.

Q. Let us simplify this a little bit so that we know what lines we are talking about?

A. Yes.

Q. If you will examine the patent, do you see the numeral "72" right there? A. Yes.

Q. And does that indicate this line right here?

A. Yes.

Q. Can we put a "72" here and draw a line right to that [316] line, there? A. Yes.

Q. And then we will understand that that means that line, wouldn't we? A. That is right.

Q. Do you see the numeral "74," right there?

A. Yes.

Q. If I put a "74" here and draw a line to this line—this edge of the lug—am I doing as—are we talking about the same thing as is in the patent?

A. That is right.

Q. All right. Then when the lines 72 and 74 intersect, we form an angle, do we not; we enclose an angle?

A. We enclose an angle. We have, of course, a corner rounded off. There is no square intersec-

(Testimony of Ross A. Himes.)

tion. Aside from the rounding off you have an angle.

Q. Why is that rounded off?

A. For easier operation of the inter-locking sections.

Q. Oh. Now, unfortunately the patent does not show—yes, it does—do you see that number “64”?

A. Yes.

Q. Would you point out on here to what that numeral refers?

A. That is the edge, here, Mr. Smith (indicating).

Q. All right. May I mark that “64” and draw a line to it? [317] A. Yes.

Q. Then the lines 72, 74 and their joinder of the line 74 with the line 64 indicates angularity throughout that arrangement, does it not?

A. Yes.

Q. The end of the lug is therefore angular, is that right? A. That is correct.

Q. I am handing you Plaintiffs' Exhibit “J,” which comprises these several specimens introduced, and I believe your testimony is that they are the product of your licensees, is that right?

A. These are the products of our licensees.

Q. I would like to ask you to refer to them and see if any of them or all of them carry the patent number 2011232?

A. This one does. Would you like to see it?

Q. Just hold it up so that the jury can see where it is.

(Testimony of Ross A. Himes.)

A. It is carried on one of the bottom panels usually. It reads "Himes patent number 2011232" in print.

Q. That is the Parks patent you are talking about?

A. Yes, that is the number of the Parks patent.

Q. Will you go on and see if any of the others do the same?

A. This has the same wording "Himes patent 2011232" in print.

Q. Just determine quickly if there are others made similarly. [318]

A. I will have to look at them to see. Sometimes these are impressed in the board with steel dies rather than printed, and it is a little hard to find it. I can't find it on this one. Possibly it is somewhere rather than on the bottom.

Q. All right; we will separate that from the others, if we may.

A. This one the patent notification reads "Himes Folding Carton, Patent Numbers 2,243,421, 2,284,283, and 2,011,232; Burt and Fletcher Company, Kansas City, Missouri."

Q. We will put that in this first pile, then.

A. All right.

Q. Any others?

A. Himes Patent Number 2,011,232.

Q. Any others?

A. I can't find it in print on this carton.

Q. Put this in our second pile, shall we, sir?

A. All right. Well, this is certainly made by one

(Testimony of Ross A. Himes.)

of our licensees, but I can't right now find the patent number.

This carton, made by Morris Paper Mills in Chicago, reads "Patent Numbers 2,460,229, 2,389,318, Patent Number 2,011,232"—the last being the Parks patent. These other two are the patents on other features of the box.

Q. We have one more right here.

A. This reads "Himes Folding Carton, Patent Numbers 2,243,421, [319] 2,011,232 and 2,284,283."

Q. We have four then which apparently do not have the patent number of the Parks patent on them; is that right?

A. On first inspection—casual inspection.

Q. Yes. They may be there?

A. They may be there.

Q. I will grant they may be there and they may not be. But at least of this Exhibit "J" there was 1, 2, 3, 4, and 5 which bear the Parks patent number on them?

A. Yes.

Q. Can you by examination of any of those and all of those tell us whether there is a single one that has an angular-shaped lug?

Mr. Mellin: If your Honor please, for the purpose of endeavoring to shorten this—the claims were read this morning and there wasn't anything said about angular lug. We are now going into claims that were limited out of the case by stipulation.

Mr. Smith: No, I don't think we are, your Honor. The witness' testimony and his statements from the stand would seem to indicate that there

(Testimony of Ross A. Himes.)

was some material difference between having the lugs rounded or angular.

The Court: Well, for that purpose I will [320] permit it.

A. Are you concerned, Mr. Smith, with the interlocking edges themselves primarily?

Q. (By Mr. Smith): The ends of the lugs.

A. I find these lugs starting straight up from their notch or from the corner and being rounded quite a bit more than we show in the Parks patent—more according to the teachings of the Himes patent than the Parks, I would say.

Q. However, on general appearance, what would you describe the ends of each of those lugs in the Exhibit “J”?

A. Starting straight from the bottom and being rounded at the corner.

Q. We could say they are round-ended?

A. Starting straight from the bottom and being rounded at the corner.

Q. Do they have waste material in connection with them? A. The lugs?

Q. Yes, sir; and the bottom flaps?

A. Yes; there is a lot of unnecessary material.

Q. In the same sense that you said that the Chadwick carton had waste material in it, is that right?

A. Yes, that is right. The Chadwick carton follows this more closely. [321]

Q. This is the model that you cut the waste material from, is it not? A. I believe it is.

(Testimony of Ross A. Himes.)

Q. What is the shape of the end of those lugs?

A. Let me get a closer look at it, if you will, please?

Q. All right. I am speaking about Plaintiffs' Exhibit "H."

A. It is a little hard to determine whether there is a straight portion near the intersection, right in the notch, or whether they are made completely round; I believe I would say they start being straight and then [322] are curved. It is hard to determine.

Q. In general, what do you think the appearance is?

A. I think the general appearance of these would lead more toward a curve than a straight line.

Q. In other words, more round ended as in Berkowitz than angular as in Parks; isn't that true?

A. Possibly so, if you want to make that broad a comparison.

Q. Do you think it is unduly broad?

A. Well, my only observation on that, Mr. Smith, would have to be that no matter what shape that particular intersection takes, whether it is straight, whether it is curved, whether it is round, the manner of operation and the end accomplished is exactly the same in both instances. It is still an inter-lock.

Mr. Smith: That is all of the questions that I have to ask at this moment.

(Testimony of Ross A. Himes.)

Mr. Mellin: May I clear up a few things, your Honor?

The Court: You may.

Cross-Examination

By Mr. Mellin:

Q. Mr. Himes, you testified concerning what you considered to be the difference between Berkowitz's disclosures—that is a box made according to Berkowitz and according [323] to Parks. In general, what is the difference—I mean in general—here is a Berkowitz box and here is a Himes box; what is the difference?

A. Well, the obvious difference to anyone that tries to use it is that the Berkowitz box is not automatic.

Q. We had a discussion with Mr. Hyndman yesterday morning with respect to making these boxes oblong; what do you have to say to that?

A. If I recall yesterday's testimony correctly, I think that Mr. Hyndman said if you would give him two weeks and ten dollars and a Staude Master Gluer that he could manufacture Berkowitz boxes on a machine.

Q. And in oblong shape?

A. And in oblong shape.

Q. And without changing the Berkowitz structure, do you recall that?

A. I believe that is right.

Q. What do you have to say to that in general?

A. Well, in general, I would say that it was a

(Testimony of Ross A. Himes.)

big order. First, from a box-making standpoint, the Berkowitz box as disclosed in the Berkowitz drawings could never be made on any machine that is presently in existence. A machine would have to be built especially for it—not just attachments added. I would be glad to show you why, if you wish. [324]

Q. I will get to that in a moment. Now, you made some samples, and the one which I have in my hand is a sample that you gave me. I understood from you that it had not been—it is to represent Berkowitz and it is a square one—and I understand from you that it has not been once erected or more than once erected?

A. It is a fresh sample. It has not been used.

Q. Will you tell us if that exactly conforms to the Berkowitz patent as you measured it off of the Berkowitz patent in proportion?

A. This sample I made myself, and it conforms exactly to what is disclosed in the Berkowitz drawings with the fact held in mind, of course, that the Berkowitz box is shown square, and I produced an oblong box.

Q. Just a moment, do I have the wrong one? Is that the square one or the oblong one?

A. This is the oblong one.

Q. I beg your pardon.

A. You don't want that (handing box back to counsel)?

Mr. Mellin: I apologize to the jury. I gave him the wrong one.

(Testimony of Ross A. Himes.)

Q. (By Mr. Mellin): Is this it (handing box to witness)? Has this been used before?

A. (Examining box): No, this sample has not been used before. This is a fresh sample. [325]

Q. Will you explain if that is made exactly in accordance with the Berkowitz disclosure?

A. This is made exactly in accordance with the Berkowitz disclosure.

Q. Did you make it yourself?

A. I made it myself.

Q. Did you make it by measuring off of Berkowitz so you would be sure to be accurate?

A. Yes; I made it to scale.

Mr. Mellin: May the witness approach the jury your Honor, and show it to them?

The Court: Yes.

Mr. Mellin: And then attempt to open it in the normal condition?

(Witness shows box to jury.)

Q. (By Mr. Mellin): And explain when you do that why it will not function to inter-lock, if it does not function. Now, would you demonstrate by showing them what occurs when you attempt to close it?

A. Well, what occurs when you attempt to close it, is that we have no positive means in this bottom construction for leading the inter-locking half circles into the correct position for closing.

Q. Then as I understand it you must leave it to chance, perhaps? [326]

A. You must leave it to chance. I might say that

(Testimony of Ross A. Himes.)

there is a possibility once in a while that one of these things might work—go all the way. But generally speaking a fresh sample——

Q. Can you hold it to one side so that his Honor can see it, too?

A. Yes. When a fresh sample—presumably a commercial sample which has not been worked before, is presented and it is to be opened for use, you will see that there is nothing to lead those opposing lugs on to the lugs next to them; and as you press towards center one will slide beneath the other instead of going over the top of the edge adjacent to the lug. Let me do that again. I want to be sure because this is an important point. It seems as though a lot is hinging on it. If the jury please, watch that action—especially in the upper and lower corners. The jury will see that there is nothing to lead that lug on to the edge or over the edge adjacent to it; and so those lugs—those half circles—when they meet, they butt up against one another. They don't slide past one another as we do in Parks. One or the other gives way, slides underneath the section, and the result is that when you try to hold anything in a box like that, it moves out in the other direction. There is no practical inter-lock in the [327] Berkowitz box.

Q. What happens if you bent those tabs and broke the goods before you did that, Mr. Himes?

A. Mr. Mellin, I believe that if you wanted me to I could prepare the semi-circular portions and use

(Testimony of Ross A. Himes.)

my fingers in such a way in opening the box that I would make it inter-lock, if you want me to do it.

Q. Well, would you bend those tabs and prepare them and then see if it will work?

A. You would have to bend them along the crease line. Would you like me to do that?

Q. If you would.

Mr. Smith: May I look at it before that is done?

Mr. Mellin: Surely.

Mr. Smith: Would you mind if I asked him one question?

Mr. Mellin: Oh, certainly.

Q. (By Mr. Smith): Can you invert that outwards so that the jury can see the bottom as you did a moment ago?

A. Yes (pushes bottom of box outward).

Q. With this ruler, holding along the crease line, will you just hold it right on the crease line so the jury can observe it?

(Witness demonstrates.) [328]

Q. (By Mr. Smith): Is that a true semi-circle?

A. That is a true semi-circle made with a pair of dividers.

Q. Or a compass? A. Or a compass.

Q. Will you do it with the other one?

Mr. Mellin: You made one with a half a quarter didn't you?

Mr. Smith: What was that?

The Witness: Yes.

Mr. Mellin: He made another box with a quarter.

(Testimony of Ross A. Himes.)

The Witness: I had no compass yesterday.

Q. (By Mr. Smith): How can you say that that center is exactly on that line if you were using a twenty-five cent piece?

A. This was made in Los Angeles, sir, with a compass. [329]

* * *

Q. (By Mr. Mellin): Will you do that now, Mr. Himes?

A. Yes. You want me to get this back together and prepare it so it will lock?

Q. Yes, make it so it will lock.

A. Shall I show the jury how it is prepared?

Q. Yes, if you will.

A. The first thing you have to do in order to make this box work at all would be to bend these flaps upward—crease them—it gives what amounts to a crease line although you are simply bending the material. Then if I guide those parts from the bottom, as I am holding it with my fingers, so that I push up on this panel here and on this panel, here, making sure that the lugs pass the sections next to them, I can make it interlock. You may have seen that before.

Mr. Mellin: May I offer the box just testified to by the witness as the exhibit next in order?

(Box marked as plaintiffs' exhibit "Q" for identification and received in evidence.)

Q. (By Mr. Mellin): Did you attempt to make a box such as this in oblong shape?

(Testimony of Ross A. Himes.)

A. Yes, I did.

Q. I hand you a box which apparently is oblong. Would you [330] show that to the jury and tell us how you made that and whether or not it follows the disclosures of the Berkowitz patent and if there are any changes in it such as in the location of the crease line, and the location of the lugs or anything, will you tell us how it was made by reference to this chart?

A. Yes. May I step up here Mr. Mellin and use a pointer?

Q. Yes; if you will.

A. (Approaches the easel): Of course, the box shown in Berkowitz is a square box. It doesn't show an oblong. But the question has come up in the last day or so as to whether or not a box made according to the Berkowitz could be made with the sides longer than the ends; in other words, rectangular in shape. I had never tried it myself, and I didn't know, so I proceeded to try it yesterday. I think I am correct in asserting that when that is attempted, there are four ways that we can attempt to do that job and still give us what we see disclosed in Berkowitz with the exception, of course, that it will be an oblong box instead of a square box.

I would say that the first way or one of the ways would be that we would have to make this distance (indicating) shorter, assuming that these are end panels and are shorter than the side panels "D" and "B." So assuming that this panel and this panel are of less [331] width than these other two;

(Testimony of Ross A. Himes.)

in order for this section to glue up onto this, this would have to be shorter, obviously; both of these would have to be shorter. Then taking that to start with, which would be a "must" of course, in order to fit this section on to this section, then we have another choice. Either we keep our 45 degree angle, here, in both cases so that the box can be glued together, which on an oblong box as I will demonstrate to you makes these lug sections occupy much less than half of the free margin, or we must allow the lug sections to occupy one-half of the free margin and run our diagonal crease line from the intersection of that half to the corner on something other than a 45 degree line.

Q. Why is that; why do you have to then start from the lug and go to the corner instead of on the 45?

A. I say if you want to maintain the fifty per cent relationship of these lugs to the complete free marginal section you must do that.

Q. Yes.

A. Then we can move from there—that gives us two choices there on one phase. Then we go to another phase. Now, let's assume that instead of these sections "C" and "A" being of less width—let's assume that those are of greater width, and that "D" and "B" are of [332] lesser width; in other words we will be putting these bottom extensions on the short side of the box. Then we have the reverse of the situation that I just told you. Again we have two choices within that—assuming that

(Testimony of Ross A. Himes.)

these are shortest, and we have a wide space here and a wide space here, then this edge—because it is going to be glued to this, and this edge because it is going to be glued to this, must be much greater than this short distance here and here (indicating). That leaves us with the condition, then, where we have the same choice. Either we must have a 45-degree angle still employed on these extensions in order to have the box flow together at all, because it won't unless they are 45 degrees—and thereby change the distance that the lugs cover the free margin section on the Berkowitz box or we must deliberately make these lugs fifty per cent of the free margin sections in order to overcome that and run our diagonal crease line from the intersection of the lug with the free marginal section to the corner, regardless of the angle that we get. I have done all four of those things just as accurately as I could with the limited tools available to me, here, and I would like to demonstrate them, Mr. Mellin.

Q. I will hand you what appears to be four samples; would you [333] take them up in your order?

Mr. Mellin: May I have them identified?

(Sample boxes marked in evidence as plaintiffs' exhibits "R," "S," "T," and "U" for identification.)

Q. (By Mr. Mellin): Now, these four samples that have been marked just now as "R," "S," "T" and "U," are samples made by you?

A. By me, yes.

(Testimony of Ross A. Himes.)

Q. And you have attempted to correspond as closely as you possibly could to the Berkowitz patent and dimensions? A. Yes.

Q. Will you proceed from there?

A. I have tried to accomplish what I have just been describing to the jury, these four phases of making a rectangular box.

Q. And those four phases are the only four choices you have that you can make?

A. They are the only four choices that are possible that I can see.

Q. With a box that is a rectangle other than a square?

A. May I apologize to Mr. Chadwick for using the Nalley's Potato Chip Box for the purpose?

Q. Go ahead.

A. Now, when we start to attempt to make a rectangular box [334] instead of a square box and still follow the Berkowitz drawings as close as we possibly can, this will be the first choice that we had—as just described to you.

You can see the same elements, here. You will notice that this panel corresponds with this one; and this panel corresponds to this one, and that they are of less width than the other two which corresponds to "E" and "D" respectively. That is, we have considered these the long panels of the box; we have considered the panels as the end panels of the box. That means then that in order to form a bottom section according to the Berkowitz disclosures—because obviously this distance is going

(Testimony of Ross A. Himes.)

to fit up to here. It can't be shorter or longer than that distance. It must be the same.

Similarly the flap on the other side must correspond to the length of the other side panel.

There are two alternatives, but the first alternative is to give the Berkowitz box the benefit of the doubt insofar as the lug covering one-half of the free margin section is concerned. I assert—and it can be measured if necessary—that this point where the lug terminates is half way between these two corners, in each case.

We have then put our diagonal fold from that intersection as shown in Berkowitz to the corner. I hope [335] that that is a clear representation to the jury.

We know that these boxes are supposed to be folded flat and delivered to a customer for quick erection. I want the jury to notice what happens when you fold on this line (folding and demonstrating with box).

Q. Could that box be folded flat or not?

A. Obviously the box could not be folded flat because here is your glue flap and here is your edge, and they come nowhere near one another.

Q. So that would have to be glued while in an open condition?

A. It could be glued up as a box in the set-up condition; yes, you could put it together this way so that it would make a box. But thereafter, if you ever wanted to re-collapse it, not having the 45 degree lines in the bottom section, you would tear

(Testimony of Ross A. Himes.)

it all to pieces. It would have to stay erected once it was put up. Well, people don't deliver folding boxes in a set-up condition. So I am inclined to rule this one out as being impractical. I will stop so far as this sample is concerned. [336]

* * *

Q. Mr. Himes, you had finished with this exhibit?

A. Yes. I had started on four samples I wanted to demonstrate for the Court and jury. I believe I had just about finished one but maybe a quick resume would conclude it.

It is the first of the alternatives that one would have in order to construct a box according to Berkowitz, showing the bottom sections attached to the long panels of a rectangular box. And I brought out that if the lugs thereon, on the free margins thereof, are made to extend from the center of that free margin section—a diagonal crease line is extended then from that point to the corners, that the angle is such that you couldn't possibly glue the box together in a flat condition. [338]

Q. Would that be an automatix box in the sense we are talking about then?

A. It couldn't possibly be an automatic box because it couldn't possibly be put together in a flat condition. I think that is clear.

Mr. Mellin: I offer that in evidence as plaintiffs' exhibit "U."

(Plaintiffs' exhibit "U" received in evidence.)

(Testimony of Ross A. Himes.)

Q. (By Mr. Mellin): Will you identify the next one by the letter on it?

A. This is exhibit "T"—plaintiffs' exhibit "T." Now the next in order I think should be this box—this sample—which shows the bottom portions or the bottom sections attached to the same long panels as we showed in the last sample—in order to complete that phase of it.

This is constructed the other one of two ways that this could be done as distinguished from the first sample that I showed you. This carries the diagonal crease line on both bottom sections so that it will be possible, when the box is folded, in preparation for completion, to have these glue sections on the ends thereof parallel with the bottom of the box. So [339] conceivably it could be glued.

That, of course, leaves us with the condition—when we do that now—running the lug extensions from that point of intersection—which you see here on Berkowitz and similarly in this sample—down to a tapered edge at the corner furthest from the bottom of the box.

Q. Where does that put the rounded end of the lug with respect to the center?

A. I am getting to that Mr. Mellin. What I was trying to explain first is that it makes this lug on the free margin considerably less than half of the free margin.

Q. Why didn't you make it longer?

A. There is a third way that this could be done. If you would employ the diagonal crease line which

(Testimony of Ross A. Himes.)

we must have in order to make the box fold into a box at all in the flat condition; and then if we want to still retain the lug section to cover one-half of the free margin—which would bring it somewhere up in here (indicating).

Q. So it would have to fold, too?

A. It would have to fold along this diagonal crease line with the rest of the thing, and of course then—when you started to try to open the box, you would have this lug bent over and forming a “V”—an upside down “V” [340] edge, two of them pressing toward one another in the middle of the box and it would be absolutely impossible to have them pass anything.

Q. Yes; thank you.

A. That I believe would clarify that point.

As I say, being that that would not work—and I believe it is easy to see that it couldn't possibly work—I have given the Berkowitz construction the benefit of the doubt, here, and have moved these points back to the point of intersection of the diagonal line.

Q. As shown in the Berkowitz drawing?

A. As shown in the Berkowitz drawing. All of these sections—features of the Berkowitz disclosure—you will see on this sample.

Now, I would like to demonstrate for the jury what happens when a box is made this way, just to cover the second phase of this demonstration.

When this box is folded as we have had called to our attention so many times, so that this section

(Testimony of Ross A. Himes.)

here glues on to the outside of this section, as shown in the progressive steps in Berkowitz, and this section is similarly folded inside of the box so that it will glue to the outside of the bottom section, the end joinder is glued outside or inside—probably outside would be just as well for the purposes of demonstrating. [341] And there we have a box (demonstrating).

Now I want to show the jury what kind of a box we have. I believe I can hold this all together in one piece while I am demonstrating it, rather than to have to glue it. Will the jury please notice the lugs in relation to the edges adjacent to them (demonstrating). Notice them approach one another, and notice that they are nowhere near one another. Obviously because it is not a square box, and because the lugs do not extend over one-half of the free margins of the bottom section; so nothing will happen. There is nothing there at all. So we don't have an automatic box, we don't have an inter-locking box.

Now as I say there is a third alternative. You could have arbitrarily made those lugs longer so they would have covered one-half of that free margin section but with this construction and with these bottom sections made in one piece rather than two, you would have to extend this crease line through the lug—if you made it any longer—thereby making it bend. And when these bottom sections approached one another you would have two corners—two up-

(Testimony of Ross A. Himes.)

side down “V’s” of cardboard approaching one another and expect them to pass and inter-lock.

I believe we can dispense with this second [342] phase. Pardon me, there is one other thing while I have this in my hand that I would like to show the Court and the Jury.

Common practice in making this type of box, generally speaking, as we have seen demonstrated many times, is to create a double fold here with the bottom sections coming up and the other section folding back upon it into a bellows fold. Now, this may be a little tricky so please follow me.

The next thing that we have always required in this demonstration of this type of automatic box is for the end assemblies to be folded over upon the body of the box, and the ends joining at the same time.

I wish the jury would please notice what happens here in this Berkowitz box. If we fold this end assembly over on to the one next to it, that is not the section that it glues on. It doesn’t jibe. It is off by two and a half inches.

At the other end similarly, when we fold the end assembly over on to the body of the box, what happens? It doesn’t jibe. It doesn’t fold on to that panel. It folds on to this one here. How can you fold that box—not by folding the end assemblies over on to the end of the box at all. The only way that this box can be folded is by hand, by taking the two right hand [343] assemblies or panels, folding them over on to the two left hand assemblies

(Testimony of Ross A. Himes.)

in this manner, and then finding some means of gluing this glue strip to the other end of the box and producing it in that manner. That supports my contention a while ago on the stand that there was not a machine of any kind in the folding box industry, to my knowledge, and I know all of them thoroughly, that is capable of making this box. It is almost an impossible procedure. I would hate the job of trying to invent or construct a machine for the purpose. Thank you.

Mr. Mellin: The model "T" identified by the witness is offered in evidence as plaintiffs' exhibit "T."

(Plaintiffs' exhibit "T" received in evidence.)

Q. (By Mr. Mellin): Will you go to the next, the third one?

A. All right. We have two down, and two to go.

We have covered both possible alternatives in attaching these bottom sections to the long panels in constructing a Berkowitz box that is rectangular. Now obviously we must go to attaching the bottom sections on the short or side or end sections of the box—the ones with the shortest width. You can see [344] this end is shorter than the other. We have placed the short panel on the left side.

Now, if the jury will please compare this construction with what is shown in the Berkowitz drawings. Obviously again we have a distance here equal to the distance that it is to glue to. Similarly

(Testimony of Ross A. Himes.)

here we have a distance that is similar to what we are going to glue to. That is necessary as is shown that by folding the bottom up in order to have a box at all you must have it. (Demonstrating.)

Now, we don't have true right angular sections like we had in the square box, and we run into trouble here. I have first to illustrate, giving the Berkowitz construction, the benefit of having its lugs extend along one-half of the free margin in both cases. I think that is a good place to start, because that is one of the things that shows in the Berkowitz box. I have then followed the Berkowitz disclosure by striking a crease line from that intersection or that center of the free margin to the closest corner in each case.

Q. Following the Berkowitz disclosure?

A. Following the Berkowitz disclosure as you see it.

Now, what happens? We start to fold this box up and make a box out of it. We fold this up and draw this [345] back (indicating).

We run into the same situation in reverse as we had on sample number 1. These point up-hill; the other pointed down-hill. There is no way that you could glue this and this and this to this.

Q. In other words, as I understand you, you couldn't have a glued together box in a collapsed condition?

A. You could not have a glued together box in a collapsed condition. I believe that that is plain.

Now to follow through on your questioning on

(Testimony of Ross A. Himes.)

sample number 1, Mr. Mellin, you could again glue this box together in an upright condition and make a box of it.

Q. Would it be a collapsible carton with an automatic opening?

A. No. It would have to be delivered as a set-up box to the customer and of course no one would do it. It shows a construction completely similar to what we see in figure 6 of Berkowitz, in that condition, except that it could not possibly fold back into the flat condition because of the absence of 45-degree lines.

That dispenses with three.

Q. That is what exhibit you are speaking of?

A. That is exhibit "R."

Mr. Mellin: I offer that in evidence, [346] your Honor, as plaintiffs' exhibit "R."

(Plaintiffs' exhibit "R" received in evidence.)

Q. (By Mr. Mellin): Now, will you take the next one?

A. In the last of these samples that are illustrating the different choices a person would have in following Berkowitz with a box that is longer than it is wide, it gives better opportunity or produces a better result than any of the three so far shown.

Q. Is this the one that is given the most chance of working of all of them?

A. This is the one that gives the most chance of working as a box at all.

(Testimony of Ross A. Himes.)

Q. That you could devise?

A. That I could devise, yes, sir. That is the reason that this box has been glued together rather than shown in a flat form first. After I demonstrate it to the Court and to the jury, I want to tear it down into flat form, too, and compare it so that you can see I am following the teachings of Berkowitz in making it.

Now, if the jury will notice, that has 45 degree angles, which allows it to be glued flat.

Q. Now, those angles don't run from the notch part to a corner; they run from some other [347] point?

A. They don't run from the notch part to a corner. In an extension here they would run on an exact 45 degree angle, the length of which would be the same as this line here.

Q. To make an isosceles triangle, so to speak?

A. Yes. That means of course that our intersection or our notch or our corner here—what is supposed to be the inter-locking point—does not coincide as it does in the Berkowitz drawings with the 45 degree angle. However, we have here what to all effects and purposes may be considered a box—a box that can be glued together and can be opened.

Now, this box has not been opened before—purposely. I didn't want it to be operated more than just this once—so without putting my fingers on the bottom, I am going to push it together for the jury (demonstrating with box). Now, we reach a

(Testimony of Ross A. Himes.)

point where we are almost to the closing position. Will the jury please notice these sections here that are touching one another—and butt up against one another; will they please notice that there is no means provided for directing those semi-circular portions past one another? I am trying my best to make this box work. I can't seem to get the inter-locking portions together, can I, so I give up and push it to the fully extended position [348] where you can see nothing is inter-locked with anything else. When you push on the bottom of that in that condition it comes right through the same as I showed you on the square box.

Do you want me to demonstrate that this could be made to work, Mr. Mellin?

Q. Go ahead.

A. I believe I could make it work if you wish. I am going to attempt to make this work because I know how to do it, having had some experience in this line. I am going to do the same thing that I did with the square box; I am going to bend these upward—in other words effect a crease in them by hand. Then as the box comes to the closing position, I am going to exert pressure with my fingers on this panel and on this panel so that I will make sure that this edge gets over the edge adjacent to it. Now, I believe that I can make this work (demonstrating). Yes.

Q. Would that be a satisfactory commercial operation, Mr. Himes?

A. Mr. Mellin, I believe the answer to that is

(Testimony of Ross A. Himes.)

obvious—it wouldn't be. We, in producing Parks boxes and Himes boxes have achieved the one objective of delivering to the customer something that is foolproof in operation, is positive in operation, that works every [349] time. These people packing on the end of a production line haven't time to bend tabs or push anything or distort it with their fingers. They must snap these boxes open and put the goods in and they are on their way. I believe I can take this box away and show the jury that it conforms to the Berkowitz construction.

Mr. Smith: Before you do that may I examine the box? May I ask a couple of questions?

Mr. Mellin: Oh, certainly.

Q. (By Mr. Smith): The box is set up?

A. It is set up, now.

Q. It will not collapse either with pressure from here or pressure from here?

A. I don't make too much of a point of that, Mr. Smith. I will grant you, if you wish, that once this box has been inter-locked by the means I just showed, it is set up; it will resist against re-opening. If that is what you wanted, you may have it, sir.

Q. Thank you.

A. While the box is in my hand I believe, too, it would be constructive before I tear it apart, to show the jury something that was brought out the other day by Mr. Thom on the stand. Mr. Thom pointed out there was a tendency in a box of this kind without any overlapping in the bottom sec-

(Testimony of Ross A. Himes.)

tion—I will see if I can [350] do this without sitting down—to form a spread here in the corners. As the goods was placed into the box, the box opens up in the corners is what I am trying to illustrate. Can you see what I mean? There is no over-lap—there is no positive guard against the material falling through it.

Well, I will take this apart because I do want to prove that it is made according to these disclosures, and that will be the last of my four samples (taking glued portions apart). All right. I think there we have it so that I can show what I mean. That shows the fourth alternative. Notice that these end panels are—those with the least width; the opposite panels are wider giving us a rectangular shape; the bottom extends down so that this is equal, to conform to this edge in both cases.

The 24 degree angle is included, here, but in order to make the box even inter-lock the hard way, we had to leave those semi-circular lugs at the 50 per cent point or half way along the free margin. That doesn't of course make it conform exactly to Berkowitz because in order to conform exactly to Berkowitz they would have had to be up here and then there would be no way in the world of making them inter-lock. They would be past center, you see. There again the only possible [351] chance a person would have of making this on a machine would be to take the two right hand panels and then seam this. Because it will be seen that this panel does not over-lap this one at all. This one works on this

(Testimony of Ross A. Himes.)

one. This one when it comes over won't fold on to the one adjacent to it; it folds on to the one on the other end. I just wanted to bring out that difference because there is a tremendous difference.

Mr. Mellin: I will offer that model just testified to by the witness in evidence as plaintiffs' "S."

(Plaintiffs' exhibit "S" received in evidence.)

Q. (By Mr. Mellin): To your knowledge, has any one commercially made a box such as shown in Berkowitz?

A. To my knowledge, there never has been one commercially produced.

Mr. Mellin: That is all.

Redirect Examination

By Mr. Smith:

Q. Just so there can be no misunderstanding, Mr. Himes, in each of these models which you have just been testifying about is it not true that this crease line extends and meets the notch? [352]

A. On each of the samples?

Q. Yes.

A. On each of these two samples?

Q. Yes. A. Yes.

Mr. Mellin: Which ones are those?

Q. (By Mr. Smith): Here is the identifying letter—"T" and "R"? A. Yes.

Q. For the purposes of the record the models

(Testimony of Ross A. Himes.)

you were speaking about are plaintiffs' exhibits "T" and "R," is that right?

A. "T" and "R," yes, I guess so. I know this one is "R." The other one is "T," yes—"T" and "R."

Q. Now, the same thing is true of this exhibit "U"; the diagonal creased line from the corner intersection with this notch that must lock?

A. Yes; this is the one that won't fold together.

Q. That is right. But in that instance and in each of these other instances it extends from the——

A. Yes. They have been made purposely so that the lug covers half of the free margin, and the diagonal extends from that halfway point to the closest corner.

Mr. Mellin: Which is that last exhibit; what is the exhibit number you referred to? [353]

The Witness: It is Exhibit "U."

Q. (By Mr. Smith): Because the black on white is easier to read, I am handing you a copy again of the Parks patent.

A. All right, Mr. Smith.

Q. And I call your attention to the language of claim 2, particularly that which refers to the crease line, beginning on page 3, the left column, in line 59.

A. "The two elements of each section being permanently connected and being creased on a line permitting folding thereof to correspond to the folding of the associated side walls." Is that what you wanted?

Q. That is enough; no more.

(Testimony of Ross A. Himes.)

A. That I did with two samples.

Q. Does that say 45 degrees?

A. No; but it would have to be 45 degrees in order to conform.

Q. I think we can grant that is a necessary limitation?
A. Yes.

Q. Does that say where that creased line extends; in other words, where it originates and where it ends?

A. We started on line 59, did we not?

Q. Yes, that is right; line 59 in the left column.

A. "The bottom sections being provided with inter-engaging locking means, being creased on a line permitting folding thereof." I believe that is the only reference, [354] isn't it?

Q. I believe you will find that is the only reference.
A. All right.

Q. That creased line, then, can extend as it does in Parks from the corner "16" out to the free margin and need not necessarily intersect the bottom of the notch; is that not correct?

A. That is true. It need not necessarily intersect the notch.

Q. Then that language you say covers a situation where the crease line does not intersect the notch?

A. You are speaking of Parks, now, sir?

Q. Yes, sir; the Parks claim, too.

A. I have been following Berkowitz in making these samples.

Q. Oh, we are not talking about the samples—we are talking about the patent.

(Testimony of Ross A. Himes.)

A. Oh, pardon me.

Q. That language that you have just read with respect to the creased line—except that we admit that the angle with respect to the corner from which it originates has to be 45 degrees—no other necessary limitations as to where it ends exists; is that not correct?

A. That is true. It would depend upon the shape of the box. [355]

Q. If it extended from the corner “16” to this notch, it would not be a 45-degree angle, would it?

A. It wouldn't be made that way because it wouldn't conform.

Q. It wouldn't work, in fact, would it?

A. No, it wouldn't work.

Q. It would have to be 45 degrees?

A. Right—let's say approximately 45 degrees.

Q. Yes, approximately 45 degrees. Now, the location of that notch on one section which locks with a notch on the other always has to be in the center of a carton at its intersection, does it not?

A. In order to make the box work, yes.

Q. Yes?

A. Excuse me, I want to qualify that. I have seen boxes made where it was not in the center. As I said this morning, my answer was a little too quick. It so happens that in this disclosure of the Parks patent and the drawings and so on it is carried in the center, but not necessarily so.

Q. Now, that creased line which we say must

(Testimony of Ross A. Himes.)

start in this corner, then, need not end at the locking notch, need it? A. It need not.

Q. It may just extend from a 45-degree angle from that [356] corner (indicating)?

A. It must.

Q. And where it strikes the free margin of the bottom half is a pure matter of construction, is it not? A. It is immaterial in the Parks box.

Q. It will work out that if you start out from a corner at 45 degrees it may be more or less than an inch, maybe, from the locking notch on ordinary cardboard?

A. Yes, I say on the Parks box it is immaterial.

Q. As a matter of fact, this box of Exhibit "S" which you had here—it came close to working—you had to force it, but it came close to working?

A. I could make it work, yes.

Q. The 45-degree angle does not coincide with the notch does it?

A. No; although it does in the Berkowitz disclosure.

Q. It would have worked a little easier had that notch been set off to one side a little farther?

A. No. It is in the exact center.

Q. Oh, it is in the exact center? A. Yes.

Q. Would it have worked a little easier, possibly if the proportion you adopted to this wall here might have been a little less than its relation to this?

A. If you are trying to say that the sample is inaccurately [357] made, I challenge you, sir. It is made exactly.

(Testimony of Ross A. Himes.)

Q. I am not saying inaccurately made. I am talking about the various possibilities. How did you arrive at this proportion shown between the longer and the shorter portion?

A. I used a Nalley's Potato Chip box on the first two and conformed to it with the other two.

Q. How long is that longer wall?

A. Nine and a quarter inches.

Q. And the shorter wall?

A. Seven inches.

Q. And that is the same proportion——

A. On all of the samples.

Q. ——on all of the samples? A. Yes.

Q. However, if that had been a little narrower wall, more in the proportion of Parks of about two to one, shall we say? A. I don't recall.

Q. Well, you can see it there (indicating patent document)?

A. I would say two to one. That is as good a figure as any.

Q. It is not nine to seven is it?

A. No. [358]

Q. If it had been a little narrower, this lug that the bottom section is attached to had been narrower, the angle would have been steeper, would it not?

A. Oh, yes.

Q. And the intersection of this crease line would have been probably farther away from the notch?

A. Away from the center, that is right.

Q. As Mr. Chadwick showed yesterday, when

(Testimony of Ross A. Himes.)

he actually cut up this box which was a locking bottom box and it did lock, didn't it?

A. I was not here during that testimony.

Q. Oh, I beg your pardon. Have you examined this? A. I would like to examine it.

Q. Would you like Mr. Chadwick to demonstrate this point?

A. I can see what he was attempting to do.

Q. What was he attempting to do?

A. He was attempting to show that he can cut up a Parks box or a Himes box and produce some similarity to a Berkowitz construction, no doubt.

Q. Rather a marked similarity, isn't there?

A. Well, now, if you are going to ask me that would you mind letting me see it, sir, and telling you what similarity I see?

Q. No; you go right ahead.

A. All right; let's take a look at it. (Takes unfolded box [359] and inspects same). Similarity and differences. I think that my first observation would be—it is more or less a casual observation—on the Berkowitz disclosure these bottom sections are shown affixed to the left hand end wall, and the alternate wall of equal width. Whereas in this sample here they are attached to the other two. That may not seem like too much of a point—just with a casual observation—but it is an important point for this reason, Mr. Smith—that this then having been cut from a Parks box with those panels on the extensions of the opposite sidewalls as you see them here would allow your end assemblies to

(Testimony of Ross A. Himes.)

come over and make a box on a folding and gluing machine; whereas this disclosure in Berkowitz, you couldn't possibly do it.

Q. What would you have to do to make it work that way?

A. You would have to transpose them, first, on to the panels on which you see them here in Mr. Chadwick's cut-down sample.

Q. What you are really saying is that the wall "A" attached on the right end needs to be on the left end, is that right?

A. That would be one way of saying it; with of course the glue flap also attached to it. I would rather say that if this one on the left were transposed over to [360] the right and then the glue flap were moved to here. Of course, these things—when you get into this kind of a discussion it becomes confusing because if you take a disclosure—something that is disclosed—and you say this is the same as that and then you begin altering that disclosure with this, that and the other thing—always in the direction of Parks it seems to me—you no longer have a Berkowitz disclosure. That is the point I am trying to make, here.

Q. Then the only difference is whether or not that wall on your left—— A. I didn't say.

Q. The primary difference is whether or not the wall on the left end is there or if it is over on this end of the series?

A. That is one of the differences. I wouldn't

(Testimony of Ross A. Himes.)

say it is the primary difference. Let us say it is one of the differences.

Another one here that we see that is obvious is that we do not have this lug extension on these panels extending along one-half of the free margin which we have in Parks in diagonal boxes. It does not extend along one-half of the free margin and couldn't in order to work. It must extend considerably below [361] the halfway point, as I illustrated in my sample number four. We have the 45 degree angle so that the box could be glued together. But we have this lug section in both cases considerably less than one-half, meeting in the center of the box, as it is closed—but the lug portions will not conform.

We have here of course a broken line instead of a straight line from this corner to the point of intersection, simply because it was impossible in cutting down this box to keep it straight. That is unimportant except that if this box were put together as it is cut you would have a lot of holes in it. If you opened it, it wouldn't be a complete closure of the bottom.

Q. The contents could fall out or dust could get in, is that correct?

A. Yes; and once it is started—it is like tearing a piece of cloth—once it is started, you might as well give up. I don't know whether I have to go any further on this, do I?

Q. The exhibit we were speaking of was defendant's exhibit "14," was it not? A. Yes.

(Testimony of Ross A. Himes.)

Q. With this ruler, will you lay it from one corner or tip of this bottom portion to the nearest wall on a diagonal and tell us what the readings are? [362]

A. What do you want me to measure, Mr. Smith? Where do you want me to start? At what point?

Q. To simplify matters, do you see this notch we are talking about right here? A. Yes.

Q. If we drew a line out from that notch and mark it with an "X"?

A. Then we have nine and a half inches, do we not?

Q. Over-all length?

A. Over-all, yes.

Q. From this corner to the notch, how long?

A. Four and three-quarters inches half way.

Q. What is two times four and three-quarters?

A. Nine and a half.

Q. Then does the lug extend one-half the length or does it not?

A. It does. I must have been in error on that.

Q. Now let us turn to claim 5, on the right hand column of page 2.

A. Don't you mean page 3?

Q. I beg your pardon; yes sir, page 3. Do you see in line 55,—let's go back just a little bit. Let's go back to line 52 where the words "Each section" begin and read from there on.

Do we agree that the word "section" is talking about [363] a half of a bottom section?

Mr. Mellin: If your Honor please, we have gone

(Testimony of Ross A. Himes.)

through the claims on Berkowitz this morning. We didn't go through them again on Redirect. I don't see why we have to go over the claims on Berkowitz with Counsel pointing them out. We will be here forever.

Mr. Smith: I don't think so, sir. The point will take just a couple of questions.

The Court: Go ahead.

Q. (By Mr. Smith): When we speak of the word section we are talking about this bottom section, are we not?

A. All right; let's say we are talking about the bottom section.

Q. Starting on line 52, with the words "Each section" will you read that?

A. "Each section being hingedly connected at two edges to the bottom edges of two adjacent sidewalls and being creased for folding on a line extending across the section from a point adjacent the hinged connection between the two sidewalls to which said section is connected, whereby said section may be folded into planes parallel with said sidewalls when the carton is collapsed. The free margin of said sections being formed with similarly shaped,"—— [364]

Q. I believe that is enough. We just want to get at that word "creased" in there. Do you remember it as you read it? A. Yes.

Q. It extends, does it not, from pointing to figure 1 of Berkowitz, the junction between the walls "C" and "B" outward at an angle? A. Yes.

(Testimony of Ross A. Himes.)

Q. We are agreed that the angle has to be 45 degrees?

A. Yes, sir, Mr. Smith; it must be 45 degrees or you can't get a box.

Q. We agree that if it intersects the notch,—we agree that if it intersects the notch it would be within the term of that claim, do we?

A. If it what?

Q. If it intersects.

All right. We agree that if it does not intersect the notch it would be there, don't we; that is the term of the Parks patent; and it does not intersect here in figure 6 of the Parks patent, does it?

A. No.

Q. The language is broad enough to cover it not intersecting the notch, isn't it?

A. Yes; it would have to be. The angle must be 45 degrees,—square or oblong. [365]

Q. All right. In the square box it is going to intersect the notch, isn't it?

A. That is true.

Q. In the rectangular box it is not?

A. That is right.

Q. And does it make any difference whether it intersects the notch in these models we are talking about down here?

A. In Parks, no,—but we are looking at a disclosure of Berkowitz. I have given you four things this morning that you never saw before, Berkowitz or any place else.

Q. I didn't intend to argue with you, sir. I am sorry that I have.

Mr. Smith: That is all.

The Witness: Thank you.

(Witness excused.)

Mr. Smith: I would like to recall Mr. Carl Thom. [366]

CARL THOM

recalled as a witness, previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Smith:

Q. I believe, Mr. Thom, you testified you have been in the box industry since approximately 1916?

A. That is right.

Q. And that that has been your principal business since that time including work as sample making and machine operation of various types in box factories?

A. That is right.

Q. Do you see on Defendant's Exhibit "17" the red line that extends in sort of a zig-zag manner from end to end in the middle of the carton?

A. Yes, I see it.

Q. And that that marks out various nesting parts?

A. Yes.

Q. And this outside of that line and those parts marked out there is a series of walls on each side?

A. That is right.

Q. How long has that particular construction been used in the business, to your knowledge?

A. Well, to my knowledge—I have been in it for 34 years and it was in vogue then when I came

(Testimony of Carl Thom.)

into it. [367] How long before that or prior to that, I couldn't say.

Q. It is an economic practice that you know of?

A. That is right.

Q. It is an economic practice, isn't it?

A. Yes, that is right.

Q. And this Exhibit "18," which I hand you and call attention to the red line running down the center, separating the parts, does that practice or that manner of constructing blanks appear to you to have any novelty in the center there at all?

A. No novelty, no. That is customary like I said before—before my time; because the dies we run when I went to work in '16 were run like this.

Q. In 1916?

A. Yes. How far before that, I couldn't say.

Mr. Smith: Thank you. That is all we have to ask at this time.

Do you have any questions?

Mr. Mellin: No.

(Witness excused.) [368]

V. B. CHADWICK

the defendant, recalled, and previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Smith:

Q. This is Defendant's Exhibit "14," Mr. Chadwick. I believe that you will recall that just before

(Testimony of V. B. Chadwick.)

lunch yesterday you cut it up into the form in which it is now found, is that not right?

A. That is right, yes.

Q. Would you hold it up again and tell us: Did you demonstrate that when those waste parts had been cut off that that bottom lug was locked, or not?

A. Yes; that was one of the principal points that I tried to make yesterday, that this waste material that was in here was not contributing to it, and that the box itself was a fully locked box and could be re-assembled in this form. I believe it has been stated that this box could not be made on known machinery available on the present market. We can make this on the machines now in our factory. We can make them on machines at the rate of about six thousand to seven thousand an hour, with a make-ready of about eight hours. In order to prove that myself last night I spent quite some considerable time in our factory to be sure I was [369] right. I would be willing to take the Court or anybody who wishes to see it down to show it to them.

Q. In holding that up did you apply pressure in such a manner before you finally pulled it apart so it should have collapsed had not those parts inter-locked?

A. I fail to follow your question.

Mr. Smith: We will withdraw that question, Mr. Reporter.

Q. (By Mr. Smith): Do you recall that after you had cut out that waste material you held the box up in such a manner to the jury?

(Testimony of V. B. Chadwick.)

A. Yes; after I had removed the waste material before we made it in the flat pattern, I held it up to the jury—as you probably remember—and collapsed it and locked it. It held its lock and couldn't be disengaged either upward or downward unless it was twisted on the inside. Inside twisting it on the inside tore the little lock.

Q. It tore the lock slightly? A. Yes.

Q. And that was before the waste material was cut off?

A. Before the waste material was cut off.

Q. Again with Exhibit "16," did you make a similar demonstration to that effect?

A. Yes. We tried it on both of them and in effect the [370] same situation developed on both of them. It is difficult to start with a pattern of a box of one style and carve it up to make another style box out of it. But I believe it is possible to do so and in a crude manner demonstrate the situation. When you start to make a crude box with the craftsmanship that is available to you, you can do that.

If you will notice, yesterday, at this same point—there has been quite an issue made here today about whether that is a true circle there or whether it is square or pointed. In our Berkowitz patent we are taught there is a lug. He drew it round. He could just as well have drawn it square. Like yesterday, I chopped off a piece of it. There is no point in it. It could be in several different forms. We could make a little triangle out of it if we want. In the Parks patent, whether the circle is large

(Testimony of V. B. Chadwick.)

or small depends on the construction of the box and how fast you want the lugs to engage with each other. But as far as it being a pertinent point in the patent or in the drawing, there, it is not. It is just there to illustrate the type of mechanism—not to give you a dimensional situation.

To substantiate that, may I have the Berkowitz patent to read, please? [371]

Q. (By Mr. Smith): Exhibit “4” (handing document to the witness).

A. I am reading from this Berkowitz patent on—it looks like line 54.

Q. What page and what column, please?

A. There is no number on the page. It is the first page here where it says “United States Patent Office.” It says here, “Referring now more specifically to the drawings which are to be interpreted as illustrative rather than specific scenes.” Right in his own drawing where he has attached the drawing to it he says that. “Referring now more specifically to the drawings which are to be interpreted as being illustrative rather than a specific sense, I have indicated a box having four rectangular sides.” He doesn’t mean that we are to get down to minute differences down here.

Mr. Mellin: If your Honor please, I think we are getting to the point where perhaps the witness is arguing the case a little too much.

The Court: That has been true with several different witnesses.

(Testimony of V. B. Chadwick.)

Mr. Mellin: I mean now we are making speeches.

The Witness: May I read one other point in the patent? [372]

Mr. Smith: Yes.

A. (Continuing): When I carved this box up we started with an oblong box and I cut it up. It was a locking box and it can be made to be locked again. This particular drawing of Berkowitz shows a square box but the intention of the patent was not to confine it to a square box.

The Court: Yes, that is objectionable.

Mr. Mellin: If your Honor please, he is now giving intentions and I think he is going a little too far.

The Court: Yes.

A. (Continuing): May I make the statement then, that the boxes we had here are of an oblong nature and can be made according to the patent. I will read the patent.

Q. (By Mr. Smith): Yes.

A. "The aforesaid description of a bottom wing structure of isosceles form will be understood as being pertinent only to that form of a box in which the bottom is substantially square. The construction moreover is equally applicable to box bottoms of oblong as distinguished from square construction but the manner of manufacture and manipulation will be in all cases practically the same." That is what we intended to do in making the oblong [373] boxes.

The Court: Is there any other examination?

Mr. Mellin: No, your Honor.

The Court: That will be all.

(Witness excused.)

The Court: Any rebuttal?

Mr. Mellin: Plaintiffs rest.

* * *

Mr. Mellin: If your Honor please, I neglected offering Exhibit "Q." Counsel has stipulated it may be received in evidence.

The Court: Very well. It will be [374] received in evidence. [375]

* * *

The Court: Well, in a situation such as this where the Court is rather uncertain as to the legal effect of the statement made by the plaintiff, I would deem it proper to deny the motion with the thought in mind that the verdict be against the movant. He can then move for a judgment notwithstanding the verdict. Then should I agree with the defendant, and on appeal—the Court on appeal disagrees with me—they could reinstate the verdict without the necessity and delay and expense of another trial.

So I am going to deny this motion with the thought that we would be very happy to hear from you on a motion for a judgment notwithstanding the verdict.

Gentlemen, I was going to discuss with you the matter of these instructions. [386]

* * *

The Court: Now getting down to these instructions—counsel have them before them. There are certain instructions proposed to which defendants have made no objection so I will give those or their substance. [391]

Mr. Smith: Excuse me, your Honor, before we get too deeply into that—I didn't realize you were going to move to them immediately. I wish to make a motion for a directed verdict in favor of the defendant on these four issues involved here.

The Court: For the same reason that I have noted before, I am denying your motion for a directed verdict upon these different claims and your defenses with the understanding that if you have an adverse verdict against you, you may take the course that is allowed to you.

Mr. Smith: Thank you, your Honor. [392]

* * *

The Court: Ladies and gentlemen, you have either heard or seen all of the evidence which will be before you in the trial of the case. That evidence consists of the sworn testimony of the various witnesses who have testified and the documentary evidence which includes all of the exhibits which have been received by the Court. Upon that evidence and upon that evidence alone you are to arrive at a verdict if you can conscientiously do so. In the trial of a case you, the jury, and I, the Judge, are what we might term a team in the judicial process in the Federal Court. You have the exclusive function to determine the issues of fact. I have the exclusive function of determining the principles of law which

are to govern you. I am about to give you those instructions. I have not intended to intimate and neither do I intend to intimate in these instructions how I feel you should decide this case. I intend—as far as I possibly [393] can—to refrain from any intimation along that line to you because I feel that this is a case which you should decide upon the facts without any assistance from the Court upon the Court's factual views.

“A patent is a grant by the United States, under authority of the United States Constitution, to a private person of the right to exclude all others from the manufacture, sale and use of a particular invention for a period of seventeen years in exchange for the disclosure of that invention to the public.”

Pursuant to Constitutional provisions, Congress has created the Patent Office to issue letters patent establishing the exact boundaries of the exclusive rights granted and has established seventeen years as the life of a patent.

This is an action for damages for patent infringement.

Plaintiffs claim that the defendant has infringed two patents owned by the plaintiffs by using them in its manufacturing operations, processes which embody the patent inventions. They seek damages for infringement.

The defendant has attacked the validity of [394] both patents, and has admitted infringement of claims 2 and 5 of the Parks Patent, No. 2,011,232, the only claims of that patent in issue here, if either or both of said claims are found by you to be valid.

Defendant has denied infringement of claim 1 of the Himes Patent, No. 2,243,421, the only claim of the Himes patent in issue here.

U. S. Patents Numbers 2,011,232 and 2,243,421 were granted under an Act of Congress which provided for the issue of a patent to any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof or more than two years prior to his application for a patent, and not in public use or on sale in this country for more than two years prior to his application for patent.

When the owner of a patent sues another for the infringement of the exclusive right which his patent grants, there are four ultimate facts which must be [395] established by satisfactory evidence under the applicable law for him to recover. They are, first, that he is the owner of the patent and has the right to maintain an action for damages covering the entire period of infringement complained of. Second, that his patent is valid. Third, that the acts complained of were committed by the defendant and do infringe the patent and, finally, that he has been damaged by that infringement and the amount of such damage.

In view of the fact that defendant has admitted that the plaintiffs are the owners of the two patents

in suit, you do not have to decide such question. In view of the fact that defendant admits that if the Parks patent Number 2,011,232 is valid that he has infringed the same and that the damages shall be \$1,500, you only are required as to the Parks patent to determine one question, namely, whether or not the same is valid.

In respect to the Himes patent Number 2,243,421 the defendant has admitted in addition to the title in plaintiffs the amount of the damages in the sum of \$100. Thus, there is in issue here both the validity of the Himes patent and infringement thereof.

Defendant, by his pleadings, puts into [396] dispute the existence of the following prerequisites to validity with respect to all the patents in suit: Originality, novelty, invention over the prior art, sufficiency of disclosure and definiteness of claim, and, therefore, on the question of validity, these are the only matters that require consideration.

If you find that any single one of these requisites is lacking in either claims 2 and 5 of the Parks patent Number 2,011,232, then you must find for the defendant as to such claim.

The Patent Office, in granting the patent in suit, determined the existence of all prerequisites to validity in favor of plaintiffs, and the grant of a patent by the Patent Office creates a *prima facie* presumption that the patent so granted is valid and enforceable. This presumption of validity, standing **alone**, is sufficient to discharge plaintiffs' burden of proof with respect to validity of the patents in suit. It is necessary for a determination that the

patents or any of them are invalid for the defendant to overcome this presumption by producing clear and cogent evidence to show that one or more of the essentials of a valid original patent is, in fact, lacking in each patent it attacks. [397]

I come now to the matter of invention: Our patent laws require that a valid patent claim should describe an invention which is both new and useful. If it does not, that claim is invalid or void. If the claim does accurately describe something which was invented and which was new and also useful, then the patent owner has a seventeen-year monopoly of the manufacture, use and sale of the invention described by such claim.

Invention is to be distinguished from workmanship of a good mechanic or engineer, skilled in the art. It is the exercise of a talent that sees something that has not been seen before.

The exercise of mechanical skill which does not amount to invention is embraced in such common expressions as "expected skill of the calling" or the "skill of the art." With the rapid advance in science and technology the level of expected skill in many fields is constantly rising. Knowledge of the prior art is not limited to the knowledge of the public generally, nor to those who carry on routine work in a complex and technical field; but it embraces that knowledge of experts, scientists, and trained engineers who have been working in the art.

Invention is the double mental act of discerning some deficiency or need and pointing out or [398] finding the means of overcoming it.

The prior art patents to Cramer, 1,662,698; Filmer (British), 345,682; Creasey, 1,679,710, and Berkowitz, 1,700,733, were before the Patent Office during the prosecution of Parks Patent 2,011,232 and were rejected by the Patent Office as disclosing the invention of said Parks patent. Therefore, the presumption of novelty and invention which arises from the grant of the patent is strengthened.

With respect to originality, the law requires for a valid patent that it be issued to the original inventor or inventors of the invention claimed. The Patent Office, by the issue of the patents in suit, has determined that the inventor recited in each of them was, in fact, the original inventor of the subject matter claimed therein, and this raises a *prima facie* presumption of originality which can be overcome only by clear and cogent evidence to the contrary.

With respect to novelty, the law requires for a valid patent that it be issued to the "first inventor" of the invention claimed. [399]

A "first inventor," as a matter of law, is a person who has invented or discovered the subject matter claimed before that subject matter was known or used by others in this country and before it was patented or described in any printed publication in this or any foreign country.

A prior patent or prior printed publication which will prevent an original inventor from being, at law, a "first" inventor may have been in this or any foreign country and must set forth a construction in a complete enough form to accomplish the

result accomplished by the claimed invention in substantially the same way. It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question.

Because the Patent Office, in granting the patents in suit, has determined that the inventions thereof were in fact first invented by the inventor or inventors recited therein, there is a *prima facie* presumption that the patents in suit satisfy the requirements of law. If the evidence presented by the defendant on the question of novelty does not go beyond that already [400] considered by the Patent Office, then the presumption of validity from the grant of the patent is strengthened and there must appear some very clear and cogent reason for differing with the Patent Office in its conclusion that the subject matter of the patents in suit was novel. In order to overcome the presumption of novelty, the defendant must prove an anticipation of the claimed invention.

With respect to either of Parks' claims 2 and 5, if you find that either claim thereof, when read in view of the elements and structure of the Berkowitz patents and its drawing, existed in the Berkowitz disclosure, you are to find such claim invalid.

The question whether an invention is new divides itself into two branches: First, was it anticipated, that is, was the same thing disclosed in an earlier patent or printed publication or had the same thing been known or done before; second, if the same thing was not patented or described or known be-

fore, were there other devices or processes so nearly like the one described in the claims of these patents that it needed no inventive ability, no exercise of inventive genius, to make the device or process which the patent [401] claims describe, but any person skilled in the art would naturally have made such changes?

As to the first branch, anticipation means the existence in the prior art—that is in previous patents or printed publications or within the knowledge of others in this country—of a thing substantially identical with the thing or things described by the claims of the patent in question. If a prior patent or a prior printed publication discloses, or if someone in this country knew of substantially the same thing which will perform substantially the same result in substantially the same way by substantially the same means, there is anticipation; the latter device or process is not patentable.

Patentable invention may exist in combining old elements in a new way so as to produce an improved result.

It is for the jury to determine, from all of the evidence in the case, whether mere mechanical skill or the exercise of the faculty of invention was required to produce the combination desired by each of the claims of the patents in suit.

With respect to utility, the law requires for [402] a valid patent that the subject matter which it claims be useful. An invention is useful within the meaning of the law if it is available for any use which on the whole is beneficial to the public. From

the grant of the patent by the Patent Office there is a presumption that the claimed invention possesses utility.

With respect to invention, the law requires for a valid patent, not merely that the claimed subject matter shall be new and useful and original work of the recited inventor, but also that it shall have required the exercise of the inventive faculty. The law does not intend a patent to be granted for every shadow or shade of an idea, but equally it is a purpose of the patent law to encourage worthwhile advances by the granting of the exclusive right to those advances. Thus, an advance does not involve invention and is unworthy of a patent if it is such an advance as requires no more than the customary skill of the art to which it relates.

The question of invention is a question of fact to be decided by the jury upon consideration of all of the evidence. If, on such consideration, the [403] jury believes that each of the patents describes and claims an advance which was, in fact, inventive, it should decide this issue in favor of the plaintiffs, otherwise, you should decide this issue in favor of the defendants.

In order to obtain a valid patent, an inventor must file in the Patent Office, in exchange for the exclusive right he is to receive, a written description of his invention, and of the manner and process of making, constructing, compounding and using it in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly

connected, to make, construct, compound and use the same.

The law requires, for a valid patent, that after making his full, clear and concise description, an inventor shall particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery. It is the purpose of the claim to mark off the metes and bounds of a patentee's exclusive rights. The claim, not the specification, measure the grant to the [404] patentee.

The defendant can overcome the presumption of sufficiency of disclosure only by clear and cogent evidency of insufficiency.

The question involved in evaluating the definiteness of a claim is whether the terms of a claim otherwise meeting the requirements of law do, or do not, have definite meaning and, therefore, are, or are not, satisfactory for the purpose of apprising the art to which they relate of the limits of the rights granted by them.

Testimony as to the definiteness or indefiniteness of the technical meaning of the terms of a patent claim by experts in the art to which the claim relates is evidence on this point.

There is no issue as to the infringement of the Parks Patent Number 2,011,232 because defendant admits infringement thereof.

However, as to infringement of the Himes Patent Number 2,243,421, you are instructed that infringement is the invasion of the patentee's right to exclude others from the use of his invention during

the seventeen year term of the patent. Infringement is to [405] be found when the accused operation accomplishes substantially the same result by substantially the same steps as set forth in claim 1. Thus, if defendant, in its operations has substantially adopted the principle of claim 1 of Himes' patent to accomplish the same purpose, he has infringed. In determining the question of infringement, which is a question of fact for the jury to decide, the jury is to look at the operations in the light of what is done and how it is done. Variances which are insubstantial, which do not prevent the accused operations being in essence the same as that claimed in the patent, do not avoid infringement. Further, infringement is to be found if the accused operation is the substantial equivalent of the subject matter as claimed in the patent, and, where the patentee has made a substantial advance in the art, he is entitled to a broad and liberal range of equivalents and where the advance is not substantial then the patent is entitled to only a narrow range of equivalents.

The burden of proving infringement rests upon the plaintiff, and plaintiff must prove infringement by preponderance of the evidence. Therefore, if you find that the evidence on this issue shall be [406] equally balanced, in other words that the scales of proof hang even, then your verdict must be for the defendant.

To find infringement of a claim, that claim must be construed consistently with the patentee's actual

achievement and advance over the prior art, and to find infringement, you must find that there has been appropriation by defendant of that achievement or advance over the prior art.

If you find that the method of manufacturing cartons by the defendant embodies the method claimed by claim 1 of the Himes patent 2,243,421, even though there is a departure from the drawings of the patent by the defendant's method to the extent of changes which would be readily conceived and made by a mechanic in the course of manufacturing cartons in accordance with the disclosure of the patent, then you should find infringement.

It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors. And you [407] should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

The counsel in the case have agreed upon a form of verdict. Since the issues have been narrowed and simplified by the stipulation heretofore filed

by counsel in the case, the counsel have agreed that what is termed in law as special verdicts will be handed to the jury or will ask be returned by the jury.

I am going to read the special verdicts that they have agreed upon,—I mean the form of the verdicts that they have agreed upon and then will briefly refer to the method which you should,—when you reach verdicts fill out the forms.

“We the jury in the above-entitled cause find,”—and there are four findings to be made,—1, “claim 2 of the Parks patent number 2,011,232 is,”—and then opposite that two words,—“valid and invalid.” 2, [408] “claim 5 of Parks patent, 2,011,232 is,”—likewise, “valid or invalid,” “Claim 1 of Himes patent 2,243,421 is,—infringed or not infringed. Claim 1 of Himes patent 2,243,421 is,—valid or invalid.”

Now, you will note as to claim 2 and claim 5 of the Parks patent and claim 1 of the Himes patent, after each one of those special verdicts appear the word “valid,—invalid.” You are to draw a line through the word which does not express your verdict. And therefore if you should find claim 2 of the Parks patent valid, just draw a line through the word “invalid.” As to claim 5, which is the number 2 special verdict, should you find that claim to be invalid you will cross out the word “valid.” And of course, as to the claim 1 of the Himes patent upon the question of infringement, if you find that it was infringed, cross out the word “not infringed.” And if you find that that patent was not

infringed, obviously you will cross out the word "infringed."

I hope that you all understand that.

Upon returning to your jury room you will first select one of your number to act as your foreman or forelady, whichever the case may be, and it will be the duty of one whom you so select to act as your spokesman in any further proceedings in this case in [409] this court. After you have retired to your jury room you may send for any or all of the exhibits which have been received in evidence in the case.

There is one final admonition the Court wishes to give to you. It is this: When you come to the Courtroom, if you happen to come here for any purpose whatsoever, you are not to divulge to the Court in any manner how you are guided numerically or otherwise upon the matter of verdict or verdicts; and that admonition I ask that you observe at all times until the jury has reached a verdict. [410]

* * *

The Court: The record will show that the jurors are all present.

Members of the jury, have you agreed upon a verdict?

The Foreman: We have, your Honor.

The Court: I believe I neglected to inform the jury that in the Federal Court it takes the unanimous vote of a verdict?

The Foreman: That has been done, sir.

The Court: Very well; if I may see it (verdict handed to the Court).

The Clerk will read the verdict.

The Clerk: Addison N. Himes and Ross A. Himes, individuals doing business under the firm name and style of Nolox Company of America, plaintiffs, versus V. B. Chadwick, an individual doing business under the firm name and style of Coast Carton Company, Civil Case number 2092, Special Verdicts. "We the jury in the above-entitled cause find, 1, Claim 2 of Parks [418] patent 2,011,232 is valid; 2, Claim 5 of Parks patent 2,011,232 is valid; 3, Claim 1 of Himes patent 2,243,421 is infringed; 4, Claim 1 of Himes patent 2,243,421 is valid.

"Signed, Henry J. Young, foreman."

* * *

Mr. Smith If your Honor please, the defendant wishes to move for judgment notwithstanding the verdict.

The Court: You can do that at any time [419] within ten days from now, you know.

Mr. Smith: Mr. Hursh and I have suggested that in view of the fact that he has to be in San Francisco very shortly,—tomorrow, as a matter of fact—that we would prefer to argue those by written brief.

The Court: Is that agreeable, Mr. Hursh?

Mr. Hursh: Yes, it is, your Honor. We have discussed it.

Mr. Smith: And the motion for a new trial.

The Court: Very well. How much time do you wish? [420]

* * *

Certificate

I Hereby Certify that as Official Reporter for the United States District Court for the Western District of Washington, Northern Division, during the trial of Addison N. Himes, and Ross A. Himes, individuals, doing business under the firm name and style of Nolox Company of America versus V. B. Chadwick, an individual, doing business under the firm name and style of Coast Carton Company, Cause No. 2092, I stenographically reported all of the testimony of the witnesses at the trial and all objections and exceptions of Counsel, together with the rulings of the Court thereon, hereto attached, consisting of pages 1 through 422, inclusive, and that the same has herewith been reduced to typewriting under my personal supervision.

Dated this 14th day of September, 1951, in Seattle, King County, Washington.

/s/ MERRITT G. DYER,

Court Reporter.

[Endorsed]: Filed September 15, 1951. [422]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision I of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75 (o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the Original papers in the file dealing with the above-entitled action, and that the same constitute the complete record on file in said cause. The papers herewith transmitted, together with plaintiffs' Exhibits A to U, inclusive, and defendant's Exhibits 1 to 14, inclusive, 16, 17 and 18, constitute the record on appeal from the order granting defendant's Motion for Judgment Notwithstanding Verdict filed May 28, 1951, and the Final Decree filed June 8, 1951, to the United States Court of Appeals for the Ninth Circuit, and are identified as follows:

1. Complaint, filed Sept. 14, 1948.
2. Praecept for Summons, filed Sept. 14, 1948.
3. Marshal's Return on Summons, filed Sept. 23, 1948.
4. Cost Bond (non-resident) of Plaintiff, filed Nov. 23, 1948.

5. Stipulation re uncertified copies of Letters Patent received in evidence, filed Jan. 7, 1949.

6. Amended Complaint, filed Feb. 9, 1949.

7. Plaintiff's Demand for Jury Trial, filed Feb. 9, 1948.

8. Motion Defendant for a More Definite Statement, filed Mar. 1, 1949.

9. More Definite Statement of Plaintiff's, filed Jul. 29, 1949.

10. Answer and Counterclaim of Defendant, filed Aug. 12, 1949.

11. Answer to Counterclaim, filed Sept. 23, 1949.

12. Plaintiff's Demand for Jury Trial, filed Sept. 23, 1949.

13. Defendant's Interrogatories under Rule 33 FRCP, filed Oct. 31, 1949.

14. Stipulation extending time to Nov. 30, 1949, within which plaintiff may answer or object to defendant's Interrogatories, filed Nov. 8, 1949.

15. Stipulation that plaintiff may have to Dec. 10, 1949, to answer or object to defendant's Interrogatories, filed Nov. 30, 1949.

16. Plaintiff's Answers and Objections to Defendant's Interrogatories, filed Dec. 9, 1949.

17. Motion Defendant for an Order Compelling Plaintiffs to Answer Certain Interrogatories, filed Dec. 15, 1949.

18. Defendant's Note for Hearing of above motion, filed Dec. 15, 1949.

19. Brief of Defendant's Points and Authorities in Support of Motion for an Order Compelling

Plaintiffs to Answer Certain Interrogatories, filed Dec. 15, 1949.

20. Memorandum in Opposition to Defendant's Motion for an Order Compelling Plaintiffs to Answer Certain Interrogatories, filed Dec. 23, 1949.

21. Stipulation re acceptance of answers to Interrogatories, by defendant, filed Jan. 6, 1950.

22. Supplemental Answers to Interrogatories, filed Jan. 23, 1950, with Nolo License Agreement attached.

23. Defendant's Statement in Accordance with Inter-Parties Stipulation of Jan. 6, 1950, filed Jan. 23, 1950.

24. Folded Carton, filed Jan. 23, 1950.

25. Motion Plaintiffs to Postpone Trial, filed Mar. 15, 1950.

26. Letter, Hursh to Mathis, dated Apr. 27, 1950, filed May 2, 1950.

27. Letter, Dr. Whalen to Arnold & Mathis, dated April 28, 1950, filed Jun. 22, 1950.

28. Request for Admission under Rule 36, filed by defendant, on Dec. 16, 1950.

29. Plaintiffs' Response to Defendant's Request for Admission under Rule 36, filed Dec. 28, 1950.

30. Plaintiffs' Interrogatories, filed Dec. 29, 1950.

31. Defendant's Response to Plaintiffs' Interrogatories, filed Jan. 6, 1951.

32. Notice of Taking Deposition of defendant, filed Jan. 10, 1951.

33. Notice of taking of deposition of Ross A. Himes, filed Jan. 10, 1951.

34. Marshal's Return on deposition subpoena, Chadwick, filed Jan. 15, 1951.

35. Request of Defendant for Admission under Rule 36, filed Jan. 18, 1951.

36. Defendant's Notice of Taking Deposition of Ross A. Himes, filed Jan. 19, 1951.

37. Praeipe for subpoena, Meade Hyndman, behalf defendant, filed Jan. 26, 1951.

38. Motion Plaintiffs to Suppress or Vacate Request for Admissions Pursuant to Rule 36 Served on Plaintiffs January 18, 1951, filed Jan. 27, 1951.

39. Notice of hearing above motion, filed Jan. 27, 1951.

40. Limitation of Issues Raised by Amended Complaint, Answer to Amended Complaint, Counterclaim, and Answer to Counterclaim, filed Jan. 31, 1951.

41. Brief on Defendant's Trial Memorandum, filed Feb. 1, 1951.

42. Plaintiffs' Requested Instructions to Jury, filed Feb. 1, 1951.

43. Defendant's Requested Instructions to Jury, filed Feb. 1, 1951.

44. Brief of Defendant in Support of Defendant's Motion for Dismissal of Claim 1 of Himes Patent Because of Failure of Plaintiffs to Disclaim Claim 3, filed Feb. 1, 1951.

45. Memorandum Relative Defendant's Motion for Dismissal of Suit on Himes Patent, filed Feb. 2, 1951.

46. Deposition of Ross A. Himes, filed Feb. 3, 1951.

47. Instructions of Court, filed Feb. 5, 1951.
48. Request of Jury for additional instructions on "new patent," filed Feb. 5, 1951.
49. Verdict of Jury, Filed Feb. 5, 1951.
50. Motions under Rule 50 and Motion to Dismiss, filed Feb. 15, 1951.
51. Memorandum on Motion Under Rule 50 and Motion to Dismiss, filed Feb. 19, 1951.
52. Stipulation extending time in which Plaintiffs may file memorandum in re Defendant's Motion for Directed Verdict, etc., filed Mar. 22, 1951.
53. Memorandum in Opposition to Defendant's Motions for Directed Verdict, Judgment Notwithstanding Verdict, New Trial, and for Dismissal, filed Mar. 22, 1951.
54. Stipulation that defendant may have to Apr. 4, 1951, within which to file answering Memorandum on Plaintiff's Memorandum in Opposition to Defendant's Motions for Directed Verdict, etc., filed Mar. 28, 1951.
55. Reply to Plaintiffs' Memorandum in Opposition, filed Apr. 4, 1951.
56. Order granting Defendant's Motion for Judgment notwithstanding verdict, filed May 28, 1951.
57. Final Decree, filed Jun. 8, 1951.
58. Notice of Appeal by Plaintiffs, filed Jun. 27, 1951.
59. Copy of Notice to Commissioner of Patents by Clerk.
60. Concise Statement of Points on Which Plain-

tiff-Appellants Intend to Rely on Appeal, filed Jul. 6, 1951.

61. Order extending time to file record on Appeal to Sept. 20, 1951, filed July 24, 1951.

62. Designation of Contents of Record on Appeal, filed Aug. 8, 1951.

63. Order directing transmission of original exhibits to United States Court of Appeals, filed Sept. 10, 1951.

64. Court Reporter's Transcript of Proceedings at Trial, filed Sept. 15, 1951. (In 3 volumes.)

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparation of the record on appeal herein on behalf of plaintiffs, to wit: Filing fee, notice of appeal \$5.00. Which amount has been paid to me by the attorneys for the appellants.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 15th day of September, 1951.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 13100. United States Court of Appeals for the Ninth Circuit. Addison N. Himes and Ross A. Himes, Appellants, vs. V. B. Chadwick, an Individual, Doing Business Under the Firm Name and Style of Coast Carton Company, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed September 17, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13100

ADDISON N. HIMES and ROSS A. HIMES, Individuals, Doing Business Under the Firm Name and Style of NOLOX COMPANY OF AMERICA, ·

Appellants,

vs.

V. B. CHADWICK, an Individual, Doing Business Under the Firm Name and Style of COAST CARTON COMPANY,

Appellee.

CONCISE STATEMENT OF
POINTS ON APPEAL

Come Now appellants Addison N. Himes and Ross A. Himes, individuals, doing business under the firm name and style of NoloX Company of America, and make the following concise statement of the points upon which they intend to rely:

1. The Court erred in setting aside the verdict of the jury.

2. The Court erred in not denying defendant's Motion for Judgment Notwithstanding the Verdict on the ground that there was substantial evidence to support the verdict of the jury.

3. The Court erred in setting aside the verdict

of the jury because in so doing, appellants were denied a trial by jury.

4. The Court erred in signing and entering the final Judgment of June 7, 1951, in that said Judgment of June 7, 1951, is against the substantial weight of the evidence.

5. The Court erred in holding claims 2 and 5 of United States Letters Patent No. 2,011,232 invalid.

6. The Court erred in holding claim 1 of United States Letters Patent No. 2,243,421 invalid.

7. The Court erred in holding claim 1 of United States Letters Patent No. 2,243,421 was not infringed.

Dated October 4, 1951.

MELLIN, HANSCOM & HURSH,

By /s/ JACK E. HURSH,

Attorneys for Appellants.

I hereby certify that a copy of the foregoing Concise Statement of Points on Appeal has this day been mailed to Ford E. Smith, 734 Central Building, Seattle 4, Washington, and C. M. McCune, 4516 University Way, Seattle 5, Washington, attorneys for appellee.

October 4, 1951.

/s/ JACK E. HURSH.

[Endorsed]: Filed October 4, 1951.

[Title of Court of Appeals and Cause.]

ORDER

Good Cause Appearing Therefor, It Is Hereby Ordered that only nine (9) copies of Book of Exhibits be printed and bound in the above-identified appeal, said Book of Exhibits to contain plaintiffs-appellants Exhibits "A," "C" and "I" and defendant-appellee's Exhibits 4, 5, 6, 7, 8, 9 and 10.

/s/ WILLIAM HEALY,

/s/ HOMER T. BONE,

/s/ WALTER L. POPE,

Judges, United States Court
of Appeals.

[Endorsed]: Filed November 21, 1951.

